82-918

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

NO. _____

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

ANDRE LOVETTE, AND SIMONA LOVETTE,
Representative of the Estate of
Andre Lovette, Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Whether the Fourth and Fourteenth Amendments prohibit the brief and limited movement of individuals reasonably suspected of criminal activity, absent probable cause to arrest?

2. Whether it is constitutionally permissible and reasonable for police to transport an individual properly detained under Terry v. Ohio, 392 U.S. 1 (1968), a short distance for a valid and reasonable investigative purpose?

3. Whether a Writ of Certiorari should be issued to resolve these questions on which conflicting decisions have been rendered by the Circuit Courts of Appeals and by the highest state courts of the nation?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania entered in this case on October 5, 1982.

OPINIONS BELOW

The Opinion below and Judgment of the Pennsylvania Supreme Court, which is unofficially reported at 450 A.2d 975 (Pa. 1981),

but which nas not yet been officially reported, is set forth in full in Appendix A, infra at 1A-15A. The Opinion below of the Pennsylvania Superior Court, which is officially reported at 271 Pa. Superior Ct. 250 (1979), and unofficially reported at 413 A.2d 390 (Pa. Superior 1979), is set forth in full in Appendix B, infra at 1B-12B.

STATEMENT OF JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on October 5, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).[1]

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[1]Because an actual case and controversy is here presented, Richardson v. Ramirez, 418 U.S. 24, 37, 94 S. Ct. 2655, 2662 (1974) (Court limited by Article III "to adjudication of actual disputes between adverse parties"), this Court's jurisdiction is not defeated by respondent Andre Lovette's death shortly after the Pennsylvania Supreme Court granted discretionary review of his case.

(Footnote 1 continued on next page.)

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When petitioner, the Commonwealth of Pennsylvania, learned of Mr. Lovette's death two years later, shortly after oral argument of the case, it immediately petitioned to abate the appeal. Respondent's counsel and respondent's mother, as representative of his estate, opposed the petition, however, and respondent's mother petitioned to be substituted for her deceased son "as a party before [the Pennsylvania Supreme] Court." See Pa.R.A.P. 502(a). Thereafter, the Pennsylvania Supreme Court denied the Commonwealth's petition. See Commonwealth v. Walker, 447 Pa. 146, 288 A.2d 741 (1972) ("... it is in the interest of both a defendant's estate and society that any challenge initiated by a defendant to the regularity or constitutionality of a criminal proceeding be fully reviewed and decided by the appellate process."). The interests of the Estate and of the Commonwealth are therefore affected by the judgment of the Pennsylvania Supreme Court.

While the question of mootness is a federal one, Liner v. Jafco, Inc., 375 U.S. 301, 304, 84 S. Ct. 391, 393 (1964), a continuing controversy, between adverse parties, leading to a judgment determining the parties' legal interests, was resolved in the state court system and is now before this Court. This is the essence of a live controversy.

(Footnote 1 continued on next page.)

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In this instance, unlike Dove v. United States, 423 U.S. 325, 96 S. Ct. 579 (1976), where the death of the petitioner during the pendency of a petition for certiorari resulted in its dismissal, there is no changed circumstance which defeats this Court's review. In Dove there was no showing that either party had an interest which continued beyond defendant's death. Here, respondent Andre Lovette's mother and personal representative willingly chose to substitute for her son, so as to protect his estate and insure that the validity of his conviction was justiciable. Respondents, therefore, may not defeat this Court's jurisdiction and cut off further appellate review, in derogation of public and state interests, simply because they achieved a "favorable" result in the Pennsylvania Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Fourteen, Section One, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 15, 1976 at 5:15 p.m., Philadelphia Police Officer James McCoy was dispatched to investigate an anonymous report of men inside a deserted house with stolen property. At the vacant building, Officer McCoy and his partner discovered stereo equipment, wrapped Christmas gifts, clothing, pottery, and other items. Further investigation revealed that a nearby house had been burglarized and that the burglars took the stolen items to the deserted premises leaving trails of footprints in a muddy plot of ground which separated the buildings (N.T. 4-7).[2]

Ten minutes after the officers' arrival, the owner of the burglarized premises returned. He told police that when he left his home at approximately

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[2] N.T. refers to the Trial Notes of Testimony.

10:30 a.m., the property was secured. The owner identified the property in the abandoned building as his (N.T. 8-9).

Within twenty minutes of the radio call Officer McCoy began to patrol the immediate area. A minute later and a block and a half away he spotted three men; they attracted his attention because each had mud on his shoes. Respondent, Andre Lovette, a member of the trio, had a paper bag in his hand (N.T. 9-11).

When stopped by Officer McCoy, none of the men was able to produce any identification (N.T. 10-11, 19). Neither could they initially explain the source of the mud on their shoes, although they later said they must have walked through a field at some time during the day. Officer McCoy next asked Lovette what was in the paper bag. He responded by showing the officer a camel-colored hat which he

claimed was just obtained from an unspecified friend (N.T. 12-13).

Based on the trio's muddy shoes and evasive answers, Officer McCoy transported them to the burglary scene, one and one-half blocks away, for possible identification of the hat by the victim. Before placing the men in the police vehicle, the officer conducted a "pat down" search; this revealed a gold ring and a silver dime of numismatic value. At the burglarized house, less than a minute later, the complainant identified the hat, ring and silver dime as items taken from his house. The three men were then placed under arrest and Lovette was charged, in the Court of Common Pleas of Philadelphia County, with burglary and theft by unlawful taking (N.T. 13-16).

After the denial of a pre-trial suppression motion, which alleged that

physical evidence was obtained in violation of Lovette's constitutional rights and the product of an arrest based on less than probable cause, respondent waived trial by jury and was convicted as charged. The trial court denied post-verdict motions and imposed a sentence of four to twenty-three months imprisonment. The conviction was affirmed by the Pennsylvania Superior Court sitting en banc. Commonwealth v. Lovette, 271 Pa. Superior Ct. 250, 413 A.2d 390 (1979) (Appendix B, infra at 1B-12B). Following the grant of a petition for allowance of appeal, the Supreme Court of Pennsylvania reversed the conviction in an opinion issued on October 5, 1982 (Appendix A, infra at 1A-15A). The Commonwealth of Pennsylvania now seeks this Court's review of that decision.

REASONS FOR GRANTING THE WRIT

THE FOURTH AND FOURTEENTH AMENDMENTS DO NOT REQUIRE THAT THE BRIEF AND LIMITED MOVEMENT OF A LAWFULLY DETAINED SUSPECT BE SUPPORTED BY PROBABLE CAUSE TO ARREST. NO CONSTITUTIONAL VIOLATION OCCURS IF A PERSON VALIDLY STOPPED AND DETAINED UNDER TERRY V. OHIO, 392 U.S. 1 (1968), IS MOVED A SHORT DISTANCE FOR A VALID AND REASONABLE INVESTIGATIVE PURPOSE.

The question presented here is whether police constitutionally may transport a suspect properly detained under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968), a short distance so that the known victim of a recent burglary may determine promptly whether property found on the suspect was stolen in the burglary.

In this case, a Philadelphia police officer who knew that the perpetrators of a recent burglary had trekked through mud with the stolen goods, stopped three men on a city sidewalk a short distance away

because the shoes of all three were covered with mud. When the trio gave evasive answers about the mud and were unable to produce identification, this officer prepared to transport them to the victim to determine if he could identify a hat which respondent carried in a bag and said was given to him by an unspecified friend. A frisk then revealed a gold ring and a dime of numismatic value in the pocket of one of respondent's companions. The officer then transported the trio one and one-half blocks to the burglary site to see if the victim could identify the hat, ring and dime. When the victim positively identified all three items as his, the three men were arrested.

The Pennsylvania Supreme Court, on these facts, held that "the added element of a transportation of the suspects from the place of the initial encounter without exigent circumstances to support that

action" constituted an arrest requiring probable cause, despite the legitimate investigative purpose of the transportation. Appendix A at 12A-13A.[3] Relying on this Court's Fourth Amendment decisions, the Pennsylvania Supreme Court concluded that movement of suspects was not encompassed in the exception to the requirement of probable cause enunciated by this Court in Terry v. Ohio, supra, and its progeny. Appendix A at 9A-11A.

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[3]The Pennsylvania Supreme Court acknowledged the reasonableness of the stop and the further detention for identification:

> The police had the option of detaining the suspects at the site of the initial encounter and either bringing the complainant to the site for his identification of the questioned articles or taking those items to him. Either situation would present a much stronger case for the position the Commonwealth presently urges.

Appendix A at 12A.

The mere fact that an individual who is reasonably suspected of criminal behavior has been moved a short distance, for a valid investigative purpose, is not determinative of whether the Fourth and Fourteenth Amendments have been violated. Rather, the question, as in any Fourth Amendment case, is whether the length and intrusiveness of the investigation was reasonable.

Where, as here, detention of an individual for identification is proper, his brief transportation to a nearby known victim is not an unreasonably greater intrusion or violative of his constitutional rights. Transport does not unduly or unreasonably delay the decision to release or arrest the suspect. Indeed, it may take longer to have witnesses brought to the site of the stop. This would defeat many prompt releases and

prevent police from expeditiously resuming their investigations when criminals are most likely to be apprehended.

Contrary to the Pennsylvania Supreme Court's conclusion, the brief detention and transportation here of the unidentified individuals suspected of a nearby, recent burglary was reasonable.[4] The time spent in transporting respondent was less than a minute. Less than a half hour elapsed between Lovette's initial contact with police and his arrest. This delay

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[4]The Pennsylvania Supreme Court's reliance on Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248 (1979), to support its conclusion that movement of a suspect necessarily constitutes an arrest for which probable cause must be present, is obviously misplaced. In Michigan v. Summers, 452 U.S. 692, 101 S. Ct. 2587 (1981), this Court expressly stated that Dunaway applies only to detentions designed to provide an opportunity for custodial interrogation. 452 U.S. at 702 n.15, 101 S. Ct. at 2593 n.15.

was no greater than that contemplated by Terry.[5] As Professor LaFave has noted, a stop remains reasonable in length so long as "... the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and ... it is rather essential to the investigation that the suspect's presence be continued during that interval." 3 W. LaFave, Search and Seizure §9.21, at 40, quoted in Michigan v. Summers, supra, 452 U.S. at 701-02 n.14, 101 S. Ct. at 2593 n.14.

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[5]The ALI Code suggests that any detention of under twenty minutes is per se reasonable in duration. See ALI Model Code of Pre-Arraignment Procedure §110.2 Commentary, at 283 (Proposed Official Draft 1975). This Court, however, has recently said that the investigative purpose of Terry is best served in some circumstances if police are able to detain for longer than the brief period involved in the Terry case. Michigan v. Summers, supra, 452 U.S. at 700 n.12, 101 S. Ct. at 2593 n.12.

The vast majority of the federal courts of appeal and state courts that have considered this issue have held that the brief transportation of suspects a short distance for identification is reasonable during an investigative detention premised on reasonable suspicion.[6] Two

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[6]See, e.g., United States v. White, 648 F.2d 29, 37 (D.C. Cir.), cert. denied, 454 U.S. 924, 102 S. Ct. 424 (1981) ("courts have routinely allowed officers to insist on reasonable changes of location when carrying out a Terry stop"); United States v. Short, 570 F.2d 1051 (D.C. Cir. 1978) (police may, pursuant to Terry stop, take defendant to nearby burglary scene); United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977), cert. denied, 435 U.S. 944, 98 S. Ct. 1527 (1978) (officer could bring defendant back into bank for Terry investigation where suspect had no identification); United States v. Oates, 560 F.2d 45 (2d Cir. 1977) (removal into nearby office); United States v. Thevis, 469 F. Supp. 490 (D. Conn.), aff'd, 614 F.2d 1293 (2d Cir. 1979), cert. denied, 446 U.S. 908, 100 S. Ct. 1834 (1980) (having defendant accompany police officer into bank manager's office did not transform investigative stop into full arrest); State v. Watson, 165 Conn. 577, 345 A.2d

(Footnote 6 continued on next page.)

federal circuit courts of appeals have held, however, that requiring an individual to

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532 (1973) (where during Terry stop credit cards and watches are observed on floor of vehicle, transport of all four occupants to police station was not an arrest); Wilkerson v. United States, 427 A.2d 923 (D.C. App.), cert. denied, 454 U.S. 852, 102 S. Ct. 295 (1981) (transporting suspect to crime scene one-half block away after suspicious answers held to be investigatory detention); District of Columbia v. M.M., 407 A.2d 698 (D.C. App. 1979) (during valid investigatory stop, proper to transport suspects to scene as well as frisk them for weapons and look in bag one carried prior to placing pair in police cruiser); Singletary v. United States, 383 A.2d 1064 (D.C. App. 1978) (same; placed in police car and returned to robbery scene one block away); People v. Hines, 94 Ill.App.3d 1041, 419 N.E.2d 420 (1981) (where police could temporarily detain suspect for investigation, it was reasonable to transport him one-half block back to scene to see whether he was involved); People v. Herron, 89 Ill. App.3d 1048, 412 N.E.2d 1365 (1980), cert. denied, 454 U.S. 1080, 102 S. Ct. 633 (1981) (brief transportation of defendants to proximate crime scene for identification by known eyewitness proper); People v. Holdman, 73 Ill.2d 213, 383 N.E.2d 155 (1978), cert. denied, 440 U.S. 938, 99 S. Ct. 1285 (1979) (return of passengers

(Footnote 6 continued on next page.)

go against his will from an airport concourse to an office for further interrogation constitutes a seizure equivalent

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(Footnote 6 continued from previous page.)

fleeing car proper under Terry); People v. Brnja, 70 App.Div.2d 17, 419 N.Y.S.2d 591 (1979), aff'd on other grounds, 50 N.Y.2d 366, 429 N.Y.S.2d 173, 406 N.E.2d 1066 (1980) (defendant stopped, frisked, handcuffed, put in car and driven one-half mile to store for identification by owner fifteen minutes to one-half hour after robbery; held reasonable without probable cause); State v. Gardner, 28 Wash. App. 721, 626 P.2d 56 (1981) (where police had report of two males in woods, reasonable to stop two males at roadside next to woods and return them to abandoned vehicle less than a mile away; held not an arrest but an investigative stop); State v. Isham, 70 Wis.2d 718, 235 N.W.2d 506 (1975) (reasonable under Terry to transport suspect two and one-half blocks for voice identification by victim). See also United States v. Post, 607 F.2d 847 (9th Cir. 1979) (if an officer is justified in stopping a person for questioning, the stop does not become an arrest if, in the absence of protest or "coercive" circumstances, the officer directs that the questioning occur in a less public place); United States v. Salter, 521 F.2d 1326 (2d Cir. 1975).

to an arrest that must be justified by probable cause.[7] California permits movement of the suspect to the crime for identification purposes only where exigent circumstances exist.[8] Review by this Court is crucial to resolve these conflicts and to provide guidance to police.

When, as here, Terry v. Ohio, supra, permits police to detain a suspect for an

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[7] United States v. Berry, 670 F.2d 583, 802 (5th Cir. 1982); United States v. Hill, 626 F.2d 429, 433-37 (5th Cir. 1980); United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977).

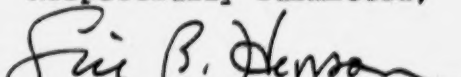
[8] See People v. Harris, 15 Cal.3d 384, 124 Cal. Rptr. 536, 540 P.2d 632 (1975), cert. denied, 425 U.S. 934, 96 S. Ct. 1664 (1976) (transport of suspect to crime scene for possible identification proper only where victim incapacitated, suspect consents, or there are other unusual circumstances which the court did not specify); In re Lynette G., 54 Cal.App.3d 1087, 126 Cal. Rptr. 898 (1976) (transport of defendant to injured victim proper under Harris); People v. Hidalgo, 78 Cal.App.3d 675, 144 Cal. Rptr. 515 (1978) (transport unreasonable under Harris guidelines).

identification, a one minute ride to the crime scene does not convert an otherwise reasonable stop into an arrest without probable cause.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA, PETITIONER	:	OCTOBER TERM, 1982
V.	:	
ANDRE LOVETTE, AND SIMONA LOVETTE, REPRESENTATIVE OF THE ESTATE OF ANDRE LOVETTE, RESPONDENTS	:	NO.

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, ESQUIRE, COUNSEL FOR PETITIONER, COMMONWEALTH OF PENNSYLVANIA, HEREBY CERTIFY THAT I HAVE CAUSED A COPY OF THIS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA TO BE SERVED UPON JOHN W. PACKEL, ESQUIRE, COUNSEL FOR RESPONDENTS, ANDRE LOVETTE AND SIMONA LOVETTE, BY DEPOSITING THREE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO JOHN W. PACKEL, ESQUIRE, DEFENDER ASSOCIATION OF PHILADELPHIA, 121 NORTH BROAD STREET, PHILADELPHIA, PENNSYLVANIA, 19107, ON THURSDAY, DECEMBER 2, 1982.

Eric B Henson

ERIC B. HENSON
DEPUTY DISTRICT ATTORNEY
LAW DIVISION
1300 CHESTNUT STREET
PHILADELPHIA, PENNA. 19107

SWORN TO AND SUBSCRIBED BEFORE ME THIS 2ND DAY OF DECEMBER, 1982, A.D.

Joyce M. Nichols

NOTARY PUBLIC

MY COMMISSION EXPIRES: 9/19/83

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 497, JANUARY TERM, 1979
	:	
v.	:	
	:	(C.P. PHILADELPHIA, CRIMINAL SECTION No. 1673, DECEMBER TERM, 1976)
ANDRE LOVETTE, APPELLANT	:	

JUDGMENT

ON CONSIDERATION WHEREOF, IT IS NOW HERE ORDERED AND ADJUDGED BY THIS COURT THAT THE JUDGMENT OF THE COURT OF COMMON PLEAS, TRIAL DIVISION, CRIMINAL SECTION - PHILADELPHIA COUNTY, BE, AND THE SAME IS HEREBY REVERSED AND A NEW TRIAL AWARDED.

BY THE COURT:

/s/ MARLENE F. LACHMAN, ESQ.
PROTHONOTARY

DATED: OCTOBER 5, 1982

[J-122]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 497 January Term, 1979
	:	
v.	:	Appeal from the Order of the Superior Court (October Term 1977, No. 2366) affirming the Judgment of Sentence of the Court of Common Pleas, Criminal Trial Division, of Philadelphia at December Term, 1976, No. 1673.
ANDRE LOVETTE,	:	
Appellant	:	
	:	
	:	Argued: April 15, 1982

OPINION

NIX, J. Filed: October 5, 1982

In this appeal appellant seeks in the alternative discharge or the award of a new trial. In the first instance it is contended the evidence presented against appellant was insufficient as a matter of law to sustain the conviction. The alternative position, that at the very least the judgment of sentence must be vacated and a new trial awarded, is predicated upon the claims that the court erred in denying the suppression motion and the rejection of after-discovered evidence was improper. Although we do not accept appellant's assertion as to the insufficiency of the evidence, we do agree that he is entitled to a new trial because of an erroneous ruling on the suppression motion.(1)

On December 15, 1976 at 3:15 p.m. Officer James McCoy, a member of the Philadelphia Police Department, was dispatched to

(1) In view of our disposition, we need not consider the merits of the after-discovered evidence claim.

5115 Willows Avenue in response to an anonymous call to investigate "males with stolen property in a vacant house." Upon the arrival of officer McCoy and his partner at the designated premises, they found stereo equipment, wrapped Christmas gifts, clothing, pottery and other items. Their inspection of the scene revealed across the driveway at 748 South 51st Street a rear door was broken down and that the hinges had been broken off. Officer McCoy entered the home and found drawers ajar and items strewn over the floor. Approximately 10 minutes after the officers' arrival at the scene, Mr. Harold Bennett appeared and identified himself as the owner of 5115 Willows Avenue. He stated that he had left his home between 10:30 A.M. and 11:00 A.M. that morning at which time the property was secured and no one had been given permission to enter in his absence. The examination of the scene also disclosed trails of footprints in a muddy plot of ground between Mr. Bennett's home and the rear of the vacant premise. Mr. Bennett identified the goods found in the abandoned premise as being taken from his home.

Officer McCoy began to patrol the area at which time he observed three males a block and a half from the scene of the burglary. The men attracted his attention because of the mud on their shoes. Appellant, a member of the trio, had a brown paper bag in his hand. The officer approached the group and they made no effort to avoid the encounter. The officer asked for identification and the three men were unable to produce any. The officer asked appellant what was in the bag he was carrying and appellant immediately replied that it contained a hat. Appellant showed the hat to the officer, at the officer's request, and stated that he had received it from a friend. In response to a question

CONCERNING THE CONDITION OF HIS SHOES, APPELLANT STATED HE HAD PROBABLY WALKED THROUGH DIRT OR A FIELD.[2]

THE OFFICER DECIDED TO TRANSPORT THE GROUP TO THE HOME OF MR. BENNETT FOR A POSSIBLE IDENTIFICATION. BEFORE PLACING THE MEN IN THE POLICE VEHICLE, THE OFFICER CONDUCTED A "PAT DOWN" SEARCH WHICH PRODUCED FROM ONE OF APPELLANT'S COMPANIONS A RING AND A SILVER DIME OF NUMISMATIC VALUE. THE COMPLAINANT IDENTIFIED THE HAT, RING AND SILVER DIME AS BEING ITEMS TAKEN FROM HIS HOUSE. THE MEN WERE THEN PLACED UNDER ARREST AND CHARGED WITH BURLGARY AND THEFT BY UNLAWFUL TAKING.

AFTER A DENIAL OF THE PRE-TRIAL SUPPRESSION MOTION, APPELLANT WAIVED TRIAL BY JURY AND PROCEEDED TO TRIAL ON THE BASIS OF THE EVIDENCE ADMITTED AT THE SUPPRESSION PROCEEDING. THE DEFENDANT RESTED WITHOUT OFFERING A DEFENSE AND WAS FOUND GUILTY AS CHARGED. SUBSEQUENT TO THE DISPOSITION OF POST-VERDICT MOTIONS ADVERSE TO APPELLANT, A SENTENCE OF A TERM OF IMPRISONMENT OF FOUR TO TWENTY-THREE MONTHS WAS IMPOSED. THE CONVICTION WAS AFFIRMED BY THE SUPERIOR COURT SITTING EN BANC BY A FOUR TO TWO VOTE.[3] WE GRANTED REVIEW.

I. SUFFICIENCY OF THE EVIDENCE.

THIS CLAIM OF APPELLANT IS QUICKLY DISPOSED OF ON THE INSTANT RECORD. THE TEST FOR SUFFICIENCY OF THE EVIDENCE IS WHETHER ACCEPTING AS TRUE ALL OF THE EVIDENCE REVIEWED IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH, TOGETHER WITH ALL REASONABLE INFERENCES

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(2) AT THE TIME THE GROUP WAS APPROACHED, THEY WERE STANDING NEAR AN AREA OF A CONCRETE AND DIRT VACANT LOT. IN THE GENERAL AREA THERE WERE MANY DIRT REAR YARDS.

(3) JUDGE SPAETH JOINED BY JUDGE HOFFMAN CONCLUDED THAT THE SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED AND THAT APPELLANT WAS ENTITLED TO A NEW TRIAL.

THEREFROM, THE TRIER OF FACT COULD HAVE FOUND THAT EACH ELEMENT OF THE OFFENSES CHARGED WAS SUPPORTED BY EVIDENCE AND INFERENCES SUFFICIENT IN LAW TO PROVE GUILT BEYOND A REASONABLE DOUBT. Commonwealth v. Ransome, 485 Pa. 490, 402 A.2d 1379 (1979); Commonwealth v. Sadusky, 484 Pa. 388, 399 A.2d 347 (1979) citing Commonwealth v. Sullivan, 472 Pa. 129, 149-150, 371 A.2d 463, 473 (1977). See also, Commonwealth v. Horton, 485 Pa. 115, 401 A.2d 320 (1979); Commonwealth v. Toney, 474 Pa. 243, 378 A.2d 310 (1977); Commonwealth v. Rose, 463 Pa. 264, 344 A.2d 324 (1975). Moreover, a claim of insufficiency of the evidence will not be assessed on a diminished record, but rather on the evidence actually presented to the finder of fact rendering the questioned verdict. Commonwealth v. Cohen, 439 Pa. 167, 413 A.2d 1066 (1980); Commonwealth v. Kuebler, 484 Pa. 358, 361 n.*, 399 A.2d 116, 117 n.* (1979); Commonwealth v. Tabb, 417 Pa. 13, 16, 207 A.2d 884, 886 (1965).

Here there is little question that the Commonwealth produced ample evidence for a finder of fact to conclude that the premises at 748 S. 51st Street had been burglarized and that there was a theft of its contents. Appellant does not challenge the proof of the fact of the burglary or the theft but rather focuses upon the evidence offered to establish his participation. Appellant characterizes the evidence in this regard as merely establishing "appellant's presence with two men, one of whom who [sic] possessed stolen property, not visible to appellant, which had been taken in the burglary committed sometime earlier that date, and appellant's possession of a hat which was similar to one taken in that burglary."

Appellant takes too narrow a view of the Commonwealth's evidence presented to establish his guilt. At trial Mr. Bennett

TESTIFIED [SIC] THE HAT AS HAVING BEEN TAKEN FROM A BUREAU DRAWER IN HIS DINING ROOM. THAT THE HAT MERELY RESEMBLED A HAT TAKEN FROM THE HOUSE DURING THE BURGLARY WAS AN INFERENCE THAT THE DEFENSE URGED THE FACT FINDER TO DRAW. HOWEVER, THE FACT FINDER WAS OBVIOUSLY FREE TO ACCEPT MR. BENNETT'S POSITIVE STATEMENT THAT THE HAT WAS IN FACT THE ONE REMOVED FROM THE HOUSE. THAT ONE OF APPELLANT'S COMPANIONS ALSO HAD ON HIS PERSON PROPERTY DEFINITELY IDENTIFIED AS BEING TAKEN DURING THE SAME BURGLARY PROVIDES A BASIS FOR FINDING THE TWO MEN AS BEING CO-PARTICIPANTS. IT UNQUESTIONABLY REFUTES THE DEFENSE'S CHARGE THAT THE EVIDENCE DID NOT ESTABLISH ANY RELATIONSHIP BETWEEN HIM AND THE OTHER TWO MALES HE WAS STANDING WITH WHEN APPROACHED BY OFFICER MCCOY. THE CONDITION OF THE SHOES OF THE TRIO WAS CONSISTENT WITH HAVING TRAVERSED THE AREA BETWEEN THE BURGLARIZED HOME AND THE VACANT PROPERTY.

THE FACT THAT THE EVIDENCE ESTABLISHING A DEFENDANT'S PARTICIPATION IN A CRIME IS CIRCUMSTANTIAL DOES NOT PRECLUDE A CONVICTION WHERE THE EVIDENCE COUPLED WITH THE REASONABLE INFERENCES DRAWN THEREFROM OVERCOMES THE PRESUMPTION OF INNOCENCE. COMMONWEALTH V. SULLIVAN, SUPRA; COMMONWEALTH V. FARQUHARSON, 467 PA. 50, 354 A.2D 545 (1976); COMMONWEALTH V. COX, 466 PA. 532, 353 A.2D 844 (1976); COMMONWEALTH V. PETRISKO, 442 PA. 575, 580, 275 A.2D 46, 49 (1971). SEE ALSO, COMMONWEALTH V. TINSLEY, 465 PA. 329, 350 A.2D 791 (1976); COMMONWEALTH V. MCINTYRE, 451 PA. 42, 47, 301 A.2D 832, 834 (1973). WE ARE SATISFIED THAT THE POSSESSION OF THE FRUITS OF THE BURGLARY FOUND ON THE APPELLANT AND HIS COMPANIONS WITHIN A BLOCK AND A HALF FROM THE SITUS OF THE CRIME, WITH HIS CLOTHING AND THAT OF HIS COMPANIONS IN A CONDITION COMPATIBLE WITH A RECENT VISIT TO THE SCENE OF THE CRIME, WITHIN A HALF AN HOUR OF THE DISCOVERY OF THE CRIME SUPPORTS A FINDING OF GUILT.

THUS THE SUFFICIENCY OF THE EVIDENCE CLAIM MAY PROPERLY BE DISMISSED AS BEING WITHOUT SUBSTANCE.

II. LEGALITY OF THE ARREST.

BOTH THE COMMONWEALTH AND THE MAJORITY OF THE SUPERIOR COURT AGREED THAT THE POLICE DID NOT HAVE PROBABLE CAUSE FOR THE ARREST OF APPELLANT AND HIS COMPANIONS UNTIL THE OWNER OF THE PREMISES IDENTIFIED THE HAT IN APPELLANT'S POSSESSION AND THE ITEMS TAKEN FROM HIS COMPANIONS AS HAVING BEEN TAKEN FROM THE BURGLARIZED PREMISES. IN THIS JURISDICTION IT IS CLEAR THAT ONE MAY NOT BE ARRESTED WITHOUT PROBABLE CAUSE. COMMONWEALTH V. BARTLETT, 486 PA. 396, 406 A.2D 340 (1979); COMMONWEALTH V. STOKES, 480 PA. 38, 389 A.2D 74 (1978); COMMONWEALTH V. DICKERSON, 468 PA. 599, 364 A.2D 677 (1976); COMMONWEALTH V. FARLEY, 463 PA. 487, 364 A.2D 299 (1976); COMMONWEALTH V. CULMER, 463 PA. 189, 344 A.2D 487 (1975); COMMONWEALTH V. JACKSON, 459 PA. 669, 331 A.2D 189 (1975); COMMONWEALTH V. RUSH, 459 PA. 23, 326 A.2D 340 (1974). WE HAVE DEFINED AN ARREST AS ANY ACT THAT INDICATES AN INTENTION TO TAKE THE PERSON INTO CUSTODY AND SUBJECTS HIM TO THE ACTUAL CONTROL AND WILL OF THE PERSON MAKING THE ARREST. COMMONWEALTH V. BOSURGI, 411 PA. 56, 190 A.2D 304 (1963). SEE ALSO, COMMONWEALTH V. NELSON, 488 PA. 148, 411 A.2D 740 (1980) CITING STEDING V. COMMONWEALTH, 480 PA. 485, 391 A.2D 989 (1978) AND COMMONWEALTH V. BROWN, 280 PA. SUPERIOR CT. 214, 326 A.2D 906 (1974); COMMONWEALTH V. SILO, 480 PA. 15, 389 A.2D 62 (1978), CERTIORARI DENIED SILO V. PENNSYLVANIA, 439 U.S. 1132, 99 S. CT. 1053, 59 L.ED.2D 94, REHEARING DENIED 440 U.S. 969, 99 S. CT. 1522, 59 L.ED.2D 785 (1979); COMMONWEALTH V. RICHARDS, 458 PA. 455, 327 A.2D 63 (1974).

THE QUESTION RAISED IS WHETHER PLACING APPELLANT IN A POLICE VEHICLE, AFTER A "PAT DOWN" SEARCH AND TRANSPORTING HIM TO THE SCENE OF THE BURGLARY CONSTITUTED AN ARREST. THERE IS NO DISPUTE THAT THE OFFICERS INTENDED TO EXERCISE CONTROL OVER APPELLANT AND HIS COMPANIONS AT LEAST UNTIL MR. BENNETT HAD AN OPPORTUNITY TO VIEW THE OBJECTS FOUND IN THEIR POSSESSION. THERE IS NO CONTENTION THAT APPELLANT VOLUNTARILY ACCOMPANIED THE OFFICER TO THE SCENE OF THE BURGLARY. SEE, E.G., COMMONWEALTH V. RICHARDS, SUPRA.

UNDER ALL OF THE CIRCUMSTANCES, IT IS CLEAR THAT THE PLACING OF APPELLANT AND HIS COMPANIONS IN THE POLICE VEHICLE FOR THE PURPOSE OF TRANSPORTING THEM TO THE SCENE OF THE OFFENSE, WITHOUT THEIR CONSENT, CONSTITUTED AN ARREST AS THAT TERM HAS BEEN DEFINED UNDER OUR CASES. IT IS EQUALLY TRUE THAT POLICE ACTION WAS A SEIZURE OF THE PERSON WITHIN THE MEANING OF THE FOURTH AMENDMENT OF THE FEDERAL CONSTITUTION. MICHIGAN V. SUMMERS, ___ U.S. ___, 69 L.ED.2D 340 (1981).

CONCEDING, IMPLICITLY, THE LONGSTANDING TRADITION IN THIS COMMONWEALTH THAT AN ARREST MUST BE SUPPORTED BY PROBABLE CAUSE, IT IS BEING URGED THAT THE SEIZURE IS CONSTITUTIONALLY PERMISSIBLE AND THAT THE LAW OF THIS COMMONWEALTH MUST ACCOMMODATE THIS LEGITIMATE EFFORT TO ENHANCE THE CAPABILITIES OF LAW ENFORCEMENT TO DETER, TO FERRET OUT AND TO PUNISH THOSE WHO WOULD DISREGARD OUR LAWS. WE ARE SATISFIED THAT THE CONSTITUTIONAL VALIDITY OF THE INSTANT SEIZURE IS AT BEST DUBIOUS AND THAT IT DOES NOT WARRANT A DEPARTURE FROM THE LONGSTANDING TRADITION THAT AN ARREST MUST BE SUPPORTED BY PROBABLE CAUSE.

TRADITIONALLY, IT WAS ACCEPTED THAT SEIZURES OF THE PERSON WERE REQUIRED BY THE FOURTH AMENDMENT TO BE BASED UPON PROBABLE

CAUSE. THIS PRINCIPLE WAS FOLLOWED WITHOUT EXCEPTION. GEISTEIN V. PUGH, 420 U.S. 103 (1975); BECK V. OHIO, 379 U.S. 89 (1964); HENRY V. UNITED STATES, 361 U.S. 98 (1959); JOHNSON V. UNITED STATES, 333 U.S. 10 (1947); UNITED STATES V. DI RE, 333 U.S. 581 (1947); CARROLL V. UNITED STATES, 267 U.S. 132 (1924). SEE ALSO, UNITED STATES EX REL. WRIGHT V. CUYLER, 563 F.2D 627 (3D CIR. 1977); UNITED STATES V. EMBRY, 546 F.2D 552 (3D CIR. 1976).

> THE "LONG-PREVAILING STANDARDS" OF PROBABLE CAUSE EMBODIED "THE BEST COMPROMISE THAT HAS BEEN FOUND FOR ACCOMMODATING [THE] OFTEN OPPOSING INTERESTS" IN "SAFEGUARD[ING] CITIZENS FROM RASH AND UNREASONABLE INTERFERENCES WITH PRIVACY" AND IN "SEEK[ING] TO GIVE FAIR LEEWAY FOR ENFORCING THE LAW IN THE COMMUNITY'S PROTECTION." BRINEGAR V UNITED STATES, 338 US 160, 176, 93 L ED 1879, 69 S. CT 1302 (1949). THE STANDARD OF PROBABLE CAUSE THUS REPRESENTED THE ACCUMULATED WISDOM OF PRECEDENT AND EXPERIENCE AS TO THE MINIMUM JUSTIFICATION NECESSARY TO MAKE THE KIND OF INTRUSION INVOLVED IN AN ARREST "REASONABLE" UNDER THE FOURTH AMENDMENT. THE STANDARD APPLIED TO ALL ARRESTS, WITHOUT THE NEED TO "BALANCE" THE INTERESTS AND CIRCUMSTANCES INVOLVED IN PARTICULAR SITUATIONS. CF. CAMARA V MUNICIPAL SOURT [SIC], 387 US 523, 18 L ED 930, 87 S CT 1727 (1967).
>
> DUNAWAY V. NEW YORK, 442 U.S. 200, 208 (1979).

THE FIRST RECOGNITION THAT THE FOURTH AMENDMENT REASONABLENESS REQUIREMENT COULD BE SATISFIED BY A SHOWING OF SOMETHING LESS THAN PROBABLE CAUSE WAS ANNOUNCED BY THE UNITED STATES SUPREME COURT IN TERRY V. OHIO, 392 U.S. 1 (1963). THE TERRY DECISION AND ITS PROGENY(4) STATED "THAT SOME SEIZURES ADMITTEDLY COVERED BY THE FOURTH AMENDMENT CONSTITUTE SUCH LIMITED INTRUSIONS ON THE PERSONAL SECURITY OF THOSE DETAINED AND ARE JUSTIFIED BY SUCH

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(4) SEE MICHIGAN V. SUMMERS, ___ U.S. ___ (1931); PENNA. V. MIMMS, 434 U.S. 106 (1977); U.S. V. BRIGNONI-PONCE, 422 U.S. 873 (1975); ADAMS V. WILLIAMS, 407 U.S. 143 (1972).

SUBSTANTIAL LAW ENFORCEMENT INTERESTS THAT THEY MAY BE MADE ON LESS THAN PROBABLE CAUSE, SO LONG AS POLICE HAVE AN ARTICUABLE [SIC] BASIS FOR SUSPECTING CRIMINAL ACTIVITY." MICHIGAN V. SUMMERS, SUPRA AT ___, 69 L.ED.2D AT 348.

HOWEVER, THE COURT HAS ADMONISHED US TO BE MINDFUL THAT THE TERRY PRINCIPLE IS AN EXCEPTION TO THE GENERAL RULE REQUIRING PROBABLE CAUSE AND MUST NOT BE EXTENDED IN SUCH A FASHION AS TO SWALLOW THE RULE. DUNAWAY V. NEW YORK, SUPRA. IN DUNAWAY THE COURT STRESSED THE IMPORTANCE OF THE GENERAL RULE REQUIRING PROBABLE CAUSE TO SATISFY THE REASONABLENESS TEST OF THE FOURTH AMENDMENT.

> THE CENTRAL IMPORTANCE OF THE PROBABLE-CAUSE REQUIREMENT TO THE PROTECTION OF A CITIZEN'S PRIVACY AFFORDED BY THE FOURTH AMENDMENT'S GUARANTEES CANNOT BE COMPROMISED IN THIS FASHION. "THE REQUIREMENT OF PROBABLE CAUSE HAS ROOTS THAT ARE DEEP IN OUR HISTORY." HENRY V UNITED STATES, 361 US 98, 100, 4 L ED 2D 134, 80 S CT 168 (1959). HOSTILITY TO SEIZURES BASED ON MERE SUSPICION WAS A PRIME MOTIVATION FOR THE ADOPTION OF THE FOURTH AMENDMENT, AND DECISIONS IMMEDIATELY AFTER ITS ADOPTION AFFIRMED THAT 'COMMON RUMOR OR REPORT, SUSPICION, OR EVEN 'STRONG REASON TO SUSPECT' WAS NOT ADEQUATE TO SUPPORT A WARRANT FOR ARREST." ID., AT 101. (FOOTNOTES OMITTED). THE FAMILIAR THRESHOLD STANDARD OF PROBABLE CAUSE FOR FOURTH AMENDMENT SEIZURES REFLECTS THE BENEFIT OF EXTENSIVE EXPERIENCE ACCOMMODATING THE FACTORS RELEVANT TO THE "REASONABLENESS" REQUIREMENT OF THE FOURTH AMENDMENT, AND PROVIDES THE RELATIVE SIMPLICITY AND CLARITY NECESSARY TO THE IMPLEMENTATION OF A WORKABLE RULE. SEE BRINEGAR V UNITED STATES, SUPRA, AT 175-176, 93 L ED 1879, 69 S CT 1302.
>
> ID. AT 213.

IN ITS ANALYSIS IN THIS CASE THE COMMONWEALTH STRESSES THE UTILITY TO CRIMINAL INVESTIGATIONS THAT IS PROVIDED BY THESE SEIZURES WITHOUT THE NEED FOR ESTABLISHING PROBABLE CAUSE. THIS IGNORES THE CLEARLY DEFINED TEST FOR ASCERTAINING THE APPLICABILITY OF THE PROBABLE CAUSE REQUIREMENT. "...[I]N ORDER TO DECIDE

WHETHER. . .[A] CASE IS CONTROLLED BY THE GENERAL RULE, IT IS NECESSARY TO EXAMINE BOTH THE CHARACTER OF THE OFFICIAL INTRUSION AND ITS JUSTIFICATION." (EMPHASIS ADDED.) MICHIGAN V. SUMMERS, SUPRA AT ___, 69 L.ED. AT 348-49. USING THE PROPER ANALYSIS WE CANNOT CONCLUDE THAT THE INSTANT SEIZURE IS SO CLEARLY WITHIN THE TERRY EXCEPTION AS TO WARRANT A DEVIATION IN THIS CASE FROM THIS JURISDICTION'S LONGSTANDING RULE OF ARREST BASED UPON A PROPER SHOWING OF PROBABLE CAUSE.

BECAUSE THE SEIZURE WAS INSPIRED TO SERVE INVESTIGATIVE PURPOSES RATHER THAN TO ARREST AND CHARGE THE SUSPECT DOES NOT, BY THAT FACT ALONE, JUSTIFY APPLICATION OF THE TERRY EXCEPTION. DUNAWAY V. NEW YORK, SUPRA.

> [T]O ARGUE THAT THE FOURTH AMENDMENT DOES NOT APPLY TO THE INVESTIGATORY STAGE IS FUNDAMENTALLY TO MISCONCEIVE THE PURPOSES OF THE FOURTH AMENDMENT. INVESTIGATORY SEIZURES WOULD SUBJECT UNLIMITED NUMBERS OF INNOCENT PERSONS TO THE HARASSMENT AND IGNOMINY INCIDENT TO INVOLUNTARY DETENTION. NOTHING IS MORE CLEAR THAN THAT THE FOURTH AMENDMENT WAS MEANT TO PREVENT WHOLESALE INTRUSIONS UPON THE PERSONAL SECURITY OF OUR CITIZENRY, WHETHER THESE INTRUSIONS BE TERMED 'ARRESTS' OR 'INVESTIGATORY DETENTIONS.'
>
> DAVIS V. MISSISSIPPI, 394 U.S. 721, 726-27 (1969).

A SIMILAR ARGUMENT WAS AGAIN REJECTED IN DUNAWAY WHERE THAT COURT OBSERVED:

> IN EFFECT, RESPONDENT URGES US TO ADOPT A MULTIFACTOR BALANCING TEST OF "REASONABLE POLICE CONDUCT UNDER THE CIRCUMSTANCES" TO COVER ALL SEIZURES THAT DO NOT AMOUNT TO TECHNICAL ARRESTS. BUT THE PROTECTIONS INTENDED BY THE FRAMERS COULD ALL TOO EASILY DISAPPEAR IN THE CONSIDERATION AND BALANCING OF THE MULTIFARIOUS CIRCUMSTANCES PRESENTED BY DIFFERENT CASES, ESPECIALLY WHEN THAT BALANCING MAY BE DONE IN THE FIRST INSTANCE BY POLICE OFFICERS ENGAGED IN THE "OFTEN COMPETITIVE ENTERPRISE OF FERRETING OUT CRIME." [CITATIONS OMITTED.] A SINGLE FAMILIAR STANDARD IS ESSENTIAL TO

> GUIDE POLICE, WHO HAVE ONLY LIMITED TIME AND EXPERTISE TO REFLECT ON AND BALANCE THE SOCIAL AND INDIVIDUAL INTERESTS INVOLVED IN THE SPECIFIC CIRCUMSTANCES THEY CONFRONT. INDEED, OUR RECOGNITION OF THESE DANGERS, AND OUR CONSEQUENT RELUCTANCE TO DEPART FROM THE PROVED PROTECTIONS AFFORDED BY THE GENERAL RULE, ARE REFLECTED IN THE NARROW LIMITATIONS EMPHASIZED IN THE CASES EMPLOYING THE BALANCING TEST. [FOOTNOTES OMITTED.]
>
> Id. AT 213-214.

THE TERRY EXCEPTION HAS BEEN MOST FREQUENTLY APPLIED IN INSTANCES INVOLVING MERELY AN INVOLUNTARY DETENTION, SEE, E.G. COMMONWEALTH V. ANDERSON, 481 PA. 292, 392 A.2D 1293 (1973); COMMONWEALTH V. JONES, 474 PA. 364, 378 A.2D 835 (1977); COMMONWEALTH V. MIMMS, 471 PA. 546, 370 A.2D 1157 (1977); COMMONWEALTH V. BAILEY, 460 PA. 493, 333 A.2D 383 (1975); COMMONWEALTH V. RICHARDS, SUPRA; COMMONWEALTH V. POLLARD, 450 PA. 133, 299 A.2D 233 (1973); BETRAND APPEAL, 451 PA. 381, 303 A.2D 436 (1973); COMMONWEALTH V. GARVIN, 448 PA. 253, 293 A.2D 33 (1972); COMMONWEALTH V. HICKS, 434 PA. 153, 253 A.2D 276 (1969). HERE WE HAVE THE ADDED ELEMENT OF A TRANSPORTATION OF THE SUSPECTS FROM THE PLACE OF THE INITIAL ENCOUNTER WITHOUT EXIGENT CIRCUMSTANCES TO SUPPORT THAT ACTION. THE POLICE HAD THE OPTION OF DETAINING THE SUSPECTS AT THE SITE OF THE INITIAL ENCOUNTER AND EITHER BRINGING THE COMPLAINANT TO THE SITE FOR HIS IDENTIFICATION OF THE QUESTIONED ARTICLES OR TAKING THOSE ITEMS TO HIM. EITHER SITUATION WOULD PRESENT A MUCH STRONGER CASE FOR THE POSITION THE COMMONWEALTH FRESENTLY URGES. THE COMMONWEALTH STRESSES THE LIMITED AREA TRAVERSED IN THE TRANSPORTATION OF APPELLANT. THIS FACT ONLY HIGHLIGHTS THE EASE WITH WHICH THE IDENTIFICATION COULD HAVE BEEN MADE WITHOUT THE MOVEMENT OF THE SUSPECTS, WHICH INCREASED THE INTRUSIVENESS OF THE ENCOUNTER. THE INSTANT FACTUAL SITUATION IS ALSO ILLUSTRATIVE OF THE UNCERTANTIES ATTENDANT TO ANY ATTEMPT TO EXPAND THE TERRY EXCEPTION AND

REINFORCES THE WISDOM OF SCRUPUOUSLY [SIC] ADHERING TO THE NARROW SCOPE OF THE EXCEPTION. DUNAWAY V. NEW YORK, SUPRA.

CONSEQUENTLY, WE MUST CONCLUDE THAT THE CONSTITUTIONAL VALIDITY OF THE SEIZURE OF THE PERSON OF APPELLANT IN THIS CASE IS AT BEST DUBIOUS. SINCE THE SEIZURE UNQUESTIONABLY CONSTITUTED AN ARREST AS DEFINED IN THIS JURISDICTION WHICH REQUIRES PROBABLE CAUSE, WE ARE NOT PERSUADED THAT WE SHOULD, ON THIS RECORD, DEPART FROM THAT LONGSTANDING RESPECTED PRECEDENT. ACCORDINGLY, WE HOLD THAT THE SEIZURE OF APPELLANT WITHOUT PROBABLE CAUSE CONSTITUTED AN ILLEGAL ARREST AND THAT THE IDENTIFICATION OF THE HAT DURING THAT ILLEGAL SEIZURE SHOULD HAVE BEEN SUPPRESSED.

THE JUDGMENT OF SENTENCE IS REVERSED AND A NEW TRIAL AWARDED.

MR. JUSTICE ROBERTS FILED A CONCURRING OPINION.

MR. JUSTICE FLAHERTY JOINED IN THIS OPINION AND THE CONCURRING OPINION OF MR. JUSTICE ROBERTS.

MR. JUSTICE MCDERMOTT FILED A DISSENTING OPINION.

[J-122]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 497 January Term, 1979
	:	
	:	Appeal from the Order of the Superior Court, at October Term 1977, No. 2366, affirming the Judgment of Sentence of the Court of Common Pleas, Criminal Trial Division, of Philadelphia at December Term, 1976, No. 1673.
v.	:	
	:	
	:	
	:	
ANDRE LOVETTE,	:	
	:	
APPELLANT	:	ARGUED: April 15, 1982

CONCURRING OPINION

ROBERTS, J. FILED: October 5, 1982

I agree that the seizure of appellant and the admission into evidence of the fruits of that unlawful arrest constitute a manifest violation of appellant's Fourth Amendment rights. Indeed, the Commonwealth concedes that appellant was seized without probable cause.

Where, as here, the police restrain a person's freedom of action beyond the period of time required to effectuate a Terry stop and without probable cause to arrest, it is of no constitutional significance whether that restraint is accomplished by detaining the person where he is initially encountered or by transporting the person to another location. In both circumstances, there is an unlawful arrest, a violation of the Fourth Amendment.

Mr. Justice Flaherty joins in this Concurring Opinion.

[J-122]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 497 January Term, 1979
	:	
	:	Appeal from the Order of the Superior Court, at October Term 1977, No. 2366, affirming the Judgment of Sentence of the Court of Common Pleas, Criminal Trial Division, of Philadelphia at December Term, 1976, No. 1673.
vs	:	
	:	
	:	
ANDRE LOVETTE,	:	
	:	
Appellant	:	Argued: April 15, 1982

DISSENTING OPINION

MR. JUSTICE McDERMOTT Filed: October 5, 1982

I DISSENT.

STRIPPED TO ITS ESSENTIALS, THE MAJORITY HOLDS OR SEEMS TO HOLD THAT, HAD THE POLICE BROUGHT THE COMPLAINANT TO THE SUSPECTS AND NOT THE SUSPECTS TO THE COMPLAINANT, THE RESULT WOULD BE DIFFERENT. SEE SLIP UP. AT 13. THE DISTANCE TRAVELLED IN EITHER INSTANCE WAS AT MOST A BLOCK AND A HALF. THAT A BLOCK AND A HALF MIGHT SWALLOW THE "TERRY EXCEPTION" IS THE TYPE OF FINICKY PRECIOUSNESS THAT HAS SOLIDIFIED OUR REPUTATION FOR UNREALITY.[1]

I WOULD AFFIRM THE ORDER OF THE SUPERIOR COURT.[2]

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1. SEE TERRY VS OHIO, 392 U.S. 1 (1968).

2. I NOTE IN PASSING THAT APPELLANT WILL BE UNABLE TO ENJOY THE LARGESSE OF THE COURT IN AWARDING HIM A NEW TRIAL BECAUSE HE DIED NEARLY TWO YEARS PRIOR TO THE ARGUMENT IN THIS CASE. THAT APPELLANT'S COUNSEL NEVER BOTHERED TO INFORM THE COURT OF THIS FACT, DEMONSTRATES EITHER A CYNICAL DISREGARD FOR THE CLIENT'S PARTICIPATION IN THE APPEAL PROCESS OR A SHOCKING ATTEMPT TO DECEIVE THIS COURT. IN EITHER EVENT, COUNSEL'S FAILURE TO NOTIFY THE COUR~ OF APPELLANT'S DEATH BRINGS TO LIGHT A SINISTER AND RAPIDLY EXPANDING SIDE OF THE CRIMINAL JUSTICE SYSTEM, IN WHICH LAWYERS PARADE ABOUT AND ARGUE AND DELAY FOR THEIR OWN BENEFIT, WHILE TRUTH AND FAIRNESS, AND EVEN THE CLIENTS' INTERESTS, ARE FORGOTTEN.

J. 776/78

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 2366 October Term, 1977
ANDRE LOVETTE, APPELLANT	:	PHILADELPHIA DISTRICT

Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, Imposed on Information No. 1673, December Session, 1976.

Before JACOBS, P.J., HOFFMAN, CERCONE, PRICE, VAN DER VOORT, SPAETH, AND HESTER, JJ.

OPINION BY CERCONE, P.J.: FILED: August 24, 1979

Appellant was convicted of burglary, theft and receiving stolen property and sentenced to four to twenty-three months imprisonment. Appellant seeks in the alternative that his judgment of sentence be arrested or that he be granted a new trial.

Appellant's first argument is that his arrest was constitutionally infirm because the police lacked probable cause to arrest him. Based upon the facts known at the time of arrest, we disagree. The arresting officer testified that on December 15, 1976 at 3:15 P.M. he received a radio dispatch to investigate males with stolen property in a deserted house. When the officers arrived they found stereos, Christmas gifts, clothing, pottery and other property stored in the vacant building. Across the driveway from the empty house, the police saw a broken rear door to a house which they discovered had been burglarized. The owner of the burglarized house later identified the goods found in the abandoned house as being stolen from his house. In transporting the stolen property to the deserted house, the burglars

CROSSED A RAIN-SOAKED BACKYARD AND LEFT MUDDY TRAILS OF FOOTPRINTS BETWEEN THE TWO HOUSES. SHORTLY AFTER THE OWNER OF THE BURGLARIZED HOUSE ARRIVED AND IDENTIFIED HIS PROPERTY, OFFICER McCOY BEGAN TO PATROL THE AREA. APPROXIMATELY ONE AND ONE-HALF BLOCKS FROM THE CRIME, THE OFFICER OBSERVED THREE MALES STANDING ON THE CORNER WITH MUD AND DIRT ON THEIR SHOES. APPELLANT WAS HOLDING A BROWN PAPER BAG IN HIS HAND. THE OFFICER APPROACHED AND REQUESTED IDENTIFICATION, BUT THE MEN DID NOT IDENTIFY THEMSELVES. WHEN ASKED HOW HIS SHOES HAD BECOME MUDDY, APPELLANT HESITATED AND REPLIED THAT HE HAD PROBABLY WALKED THROUGH DIRT OR A FIELD IN THE COURSE OF A DAY. THE OFFICER THOUGHT THE ANSWER EVASIVE. WHEN OFFICER McCOY INQUIRED INTO THE CONTENTS OF THE PAPER BAG, APPELLANT SHOWED THE OFFICER A CAMEL-HAIR COLORED HAT AND RESPONDED THAT HE JUST GOT IT FROM A FRIEND OF HIS. OFFICER McCOY THEN DECIDED TO TRANSPORT THE TRIO ONE AND ONE-HALF BLOCKS TO SEE IF THE BURGLARY VICTIM COULD IDENTIFY THE HAT. BEFORE PLACING THE GROUP IN THE POLICE WAGON, THE OFFICER CONDUCTED A "PAT-DOWN" SEARCH WHICH REVEALED THAT ONE OF APPELLANT'S COMPANIONS POSSESSED A RING AND A SILVER DIME WITH NUMISMATIC VALUE. THE COMPLAINANT IDENTIFIED ALL THREE ITEMS AS BEING TAKEN FROM HIS HOUSE. ALL THREE MEN WERE THEN ARRESTED AND TAKEN TO THE POLICE STATION.

APPELLANT DOES NOT ACTIVELY CONTEND THAT THE POLICE OFFICER WAS NOT PERMITTED TO STOP AND DETAIN HIM BRIEFLY FOR IDENTIFICATION. NOR DOES APPELLANT ASSERT THAT THE POLICE LACKED PROBABLE CAUSE TO ARREST HIM ONCE THE HAT HAD BEEN IDENTIFIED. RATHER HE CONTENDS THAT PROBABLE CAUSE WAS LACKING WHEN THE OFFICER DROVE APPELLANT TO THE BURGLARIZED HOUSE. APPELLANT IDENTIFIES THE OFFICER'S PLACING HIM IN THE PATROL WAGON AS THE TIME OF THE ARREST, BECAUSE HE WAS SUBJECT TO THE CONTROL OF THE OFFICER.

WHILE WE ACCEPT THAT APPELLANT WAS REQUIRED TO ACCOMPANY THE OFFICER FOR THE ONE AND ONE-HALF BLOCK TRIP, WE DISAGREE WITH HIS CONCLUSION THAT IN ORDER TO DO SO THE POLICE WERE REQUIRED TO HAVE THE SAME QUANTUM OF PROOF NECESSARY TO SUPPORT A FULL-BLOWN ARREST. WE ARE NOT FACED WITH THE ASPECTS OF SUCH AN ARREST BUT, RATHER, WITH AN IDENTIFICATION PROCEDURE BY WHICH THE OFFICER COULD DETERMINE WHETHER THERE WAS PROBABLE CAUSE TO ARREST APPELLANT AND FORMALLY CHARGE HIM WITH THE CRIMINAL OFFENSES. INSTEAD OF ARRESTING APPELLANT, THE OFFICER MADE AN INTERMEDIATE RESPONSE BY TRANSPORTING APPELLANT AND THE PROPERTY A SHORT DISTANCE FOR IDENTIFICATION. INTERMEDIATE RESPONSES PREVIOUSLY HAVE BEEN APPROVED BY THE COURTS OF THIS COMMONWEALTH. COMMONWEALTH V. LESEUER, 252 PA. SUPERIOR CT. 498 (1977); COMMONWEALTH V. HARPER, 248 PA. SUPERIOR CT. 344 (1977), AS GUIDED BY THE SUPREME COURT DECISIONS IN TERRY V. OHIO, 392 U.S. 1 (1968), AND ADAMS V. WILLIAMS, 407 U.S. 143 (1972). THE OFFICER IN THIS CASE WAS RELUCTANT TO LET APPELLANT FREE TO LEAVE AS NEITHER APPELLANT NOR HIS COMPANIONS HAD IDENTIFIED THEMSELVES; AND THE HAT, AS EVIDENCE, COULD EASILY BE DESTROYED OR CONCEALED. AT THE SAME TIME, THE OFFICER WAS RELUCTANT TO ARREST APPELLANT ON THE BASIS OF THE INFORMATION KNOWN TO HIM AT THIS TIME. RATHER THAN FORCE THE OFFICER TO CHOOSE BETWEEN SUCH OPPOSITE RESPONSES, THIS COURT SANCTIONS THE USE OF AN INTERMEDIATE RESPONSE SUCH AS THE ONE USED IN THIS CASE. SEE ALSO COMMONWEALTH V. HARPER, SUPRA. OBVIOUSLY, ONCE THE HAT HAD BEEN IDENTIFIED, THE OFFICER HAD THE REQUISITE INFORMATION TO ARREST APPELLANT. COMMONWEALTH V. JONES, 457 PA. 423, 428 (1974). ACCORDINGLY, WE FIND NO ERROR IN THE COURT'S REFUSING TO SUPPRESS EVIDENCE DEMONSTRATING THAT THE HAT HAD BEEN STOLEN.

SECONDLY, APPELLANT CONTESTS THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN HIS CONVICTION OF BURGLARY, THEFT AND RECEIVING STOLEN PROPERTY. THE STANDARD OF APPELLATE REVIEW IS CLEAR AND UNCONTESTED. "THE TEST OF SUFFICIENCY OF THE EVIDENCE IS WHETHER ACCEPTING AS TRUE ALL THE EVIDENCE, TOGETHER WITH ALL REASONABLE INFERENCES THEREFROM UPON WHICH THE [FACTFINDER] COULD PROPERLY HAVE BASED ITS VERDICT, SUCH EVIDENCE AND INFERENCES ARE SUFFICIENT IN LAW TO PROVE GUILT BEYOND A REASONABLE DOUBT." COMMONWEALTH V. GREEN, 464 PA. 557, 565 (1975); COMMONWEALTH V. HARLEY, 250 PA. SUPERIOR CT. 402 (1978). APPELLANT FRAMES HIS ARGUMENT THAT A CONVICTION CANNOT STAND "SIMPLY BECAUSE HE HAD A HAT SIMILAR TO ONE BELIEVED TAKEN IN A BURGLARY, AND WAS SEEN STANDING ON A STREET CORNER NEXT TO A MAN [LATER] FOUND TO BE IN POSSESSION OF ITEMS TAKEN IN A BURGLARY OF A NEARBY HOUSE." IF THIS WERE THE EXTENT OF THE COMMONWEALTH'S EVIDENCE, APPELLANT'S ARGUMENT WOULD BE MUCH STRONGER. ADDITIONAL CIRCUMSTANTIAL EVIDENCE WAS PRODUCED AT TRIAL WHICH, TAKEN ALONG WITH PERMISSIBLE INFERENCES FROM SUCH EVIDENCE, SUPPLIED ANY MISSING LINK IN THE CHAIN OF THE COMMONWEALTH'S PROOF. APPELLANT WAS IN POSSESSION OF A CAMEL-HAIR COLORED HAT WHICH THE COMPLAINANT TESTIFIED WAS ALIKE IN EVERY DETAIL TO THE ONE STOLEN FROM HIS HOUSE. FURTHERMORE, THE POLICE WERE INSTRUCTED TO INVESTIGATE MALES IN A VACANT HOUSE WITH PROPERTY WHICH WAS LATER IDENTIFIED AS THAT STOLEN FROM COMPLAINANT'S HOUSE. SHORTLY THEREAFTER, APPELLANT AND HIS TWO COMPANIONS WERE FOUND IN POSSESSION OF SOME OF THE STOLEN PROPERTY ONLY ONE AND ONE-HALF BLOCKS AWAY FROM THE BURGLARIZED HOUSE. FINALLY, THE BURGLARS HAD CROSSED A MUDDY BACKYARD IN PERPETRATING THE CRIME AND APPELLANT'S SHOES WERE COVERED WITH MUD.

ALTHOUGH A CONVICTION CANNOT REST UPON MERE PRESENCE NEAR THE SCENE OF THE CRIME, COMMONWEALTH V. ROSCIOLI, 454 PA. 59 (1973), OR UPON MERE SUSPICION OR CONJECTURE, COMMONWEALTH V. BAILEY, 443 PA. 224 (1974), THE COMMONWEALTH'S BURDEN MAY BE MET ENTIRELY BY CIRCUMSTANTIAL EVIDENCE, COMMONWEALTH V. BAILEY, SUPRA, AND IT IS SUFFICIENT IF THE CIRCUMSTANCES ARE CONSISTENT WITH CRIMINAL ACTIVITY EVEN THOUGH THEY MIGHT LIKEWISE BE CONSISTENT WITH INNOCENT BEHAVIOR. COMMONWEALTH V. RAMBO, 250 PA. SUPERIOR CT. 314 (1977); COMMONWEALTH V. MOORE, 226 PA. SUPERIOR CT. 32 (1973). GIVEN THE SURROUNDING FACTS AND PERMISSIBLE INFERENCES IN THIS CASE, WE CONCLUDE THAT A FACTFINDER COULD FIND APPELLANT GUILTY BEYOND A REASONABLE DOUBT OF THE CRIMES CHARGED.

APPELLANT'S FINAL CONTENTION IS THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL ON THE BASIS OF AFTER DISCOVERED EVIDENCE. THE NEW "EVIDENCE" IS THE TESTIMONY OF THE COMPLAINANT PROVIDED DURING THE HEARING ON POST-VERDICT MOTIONS, THAT HE WAS MISTAKEN IN HIS TRIAL TESTIMONY THAT THE HAT IN APPELLANT'S POSSESSION WAS STOLEN FROM HIS HOUSE. THE COMPLAINANT EXPLAINED THAT AT TRIAL HE BELIEVED THAT HIS FRIEND, MICHAEL LEONARD, HAD LEFT THE HAT AT HIS HOUSE, BUT LATER LEARNED AFTER TRIAL THAT LEONARD HAD FOUND HIS HAT. APPARENTLY, THE WITNESS RECANTED HIS TESTIMONY AT TRIAL THAT THE HAT WAS IN HIS HOUSE ON THE DAY OF THE ROBBERY.

THE TRIAL JUDGE WHO HEARD THIS MODIFIED TESTIMONY OF THE COMPLAINANT BELIEVED IT TO BE FALSE AND REFUSED TO GRANT A NEW TRIAL. THERE WERE GOOD REASONS TO REJECT IT. FIRST, IT WAS HEARSAY BASED UPON THE ALLEGED STATEMENTS OF MICHAEL LEONARD WHOSE WHEREABOUTS WERE CURRENTLY UNKNOWN, BUT BELIEVED TO BE TEXAS. SECOND, THE TESTIMONY WAS ONLY OFFERED AFTER APPELLANT AND HIS

MOTHER PAID A VISIT TO THE COMPLAINANT'S HOME. THIRD, THE COMPLAINANT ADMITTED HAVING HEARD RUMORS IN THE NEIGHBORHOOD THAT APPELLANT DID NOT BURGLARIZE HIS HOME. FOURTH, IF THE HAT DID NOT BELONG TO MICHAEL LEONARD, AND APPELLANT'S EXPLANATION THAT IT BELONGED TO A FRIEND OF HIS WERE TRUE, WHY DID NOT APPELLANT'S FRIEND APPEAR AND TESTIFY? AND, FINALLY, AT THE HEARING THE COMPLAINANT WAS ARGUMENTATIVE WITH THE ASSISTANT DISTRICT ATTORNEY AND, IN GENERAL, CONDUCTED HIMSELF AS AN ADVOCATE FOR APPELLANT'S INNOCENCE [SIC] THAN AS A VICTIM OF A CRIME. THESE FACTORS, WHEN COUPLED WITH THE STRONG AND SURE IDENTIFICATION THE COMPLAINANT PROVIDED FOR THE HAT AT TRIAL, AND HIS UNSHAKEABLE CERTITUDE THAT THE HAT WAS IN HIS HOUSE ON THE DAY OF THE BURGLARY, PROVIDE AMPLE BASIS FOR THE COURT BELOW TO REFUSE TO GRANT A NEW TRIAL. BECAUSE "RECANTING TESTIMONY IS EXTREMELY UNRELIABLE, IT IS THE DUTY OF THE COURT TO DENY A NEW TRIAL WHERE IT IS NOT SATISFIED THAT THE TESTIMONY IS TRUE." COMMONWEALTH V. COLEMAN, 438 PA. 373, 377 (1970). AND, ON APPEAL, WE MAY NOT INTERFERE WITH THE TRIAL COURT'S EVALUATION OF THE TESTIMONY UNLESS THERE HAS BEEN A CLEAR ABUSE OF DISCRETION. COMMONWEALTH V. ANDERSON, 466 PA. 339 (1976); COMMONWEALTH V. COLEMAN, SUPRA. BASED UPON THE FOREGOING, WE CAN FIND NO ABUSE OF DISCRETION IN THE COURT'S REJECTING THE RECANTING TESTIMONY.

JUDGMENT OF SENTENCE AFFIRMED.

SPAETH, J. FILES A DISSENTING OPINION IN WHICH HOFFMAN, J. JOINS. JACOBS, FORMER P.J. DID NOT PARTICIPATE IN THE CONSIDERATATION OR DECISION OF THIS CASE.

J. 776/78

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF PENNSYLVANIA

v. : PHILADELPHIA DISTRICT

ANDRE LOVETTE,

APPELLANT : No. 2366 OCTOBER TERM 1977

APPEAL FROM JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS OF PHILA. COUNTY, TRIAL DIV., CRIMINAL SECT., IMPOSED ON INFORMATION NO. 1673 DECEMBER SESSION 1976.

EN BANC

BEFORE JACOBS, P.J., HOFFMAN, CERCONE, PRICE, VAN DER VOORT, SPAETH AND HESTER, JJ.

DISSENTING OPINION BY SPAETH, J.: FILED: AUGUST 24, 1979

THE MAJORITY HOLDS THAT THE POLICE, BY PUTTING APPELLANT INTO THE POLICE WAGON AND TRANSPORTING HIM TO THE SCENE OF THE BURGLARY, DID NOT "ARREST" HIM, BUT INSTEAD CARRIED OUT A PERMISSIBLE "INTERMEDIATE RESPONSE", SHORT OF A FULL ARREST. SLIP OP. AT 3. THIS HOLDING, I SUBMIT, IS INCORRECT UNDER A NUMBER OF DECISIONS, WHICH JUDGE HESTER COLLECTED AND STATED IN COMMONWEALTH V. GRAY, ___ PA. SUPERIOR CT. ___, ___ A.2D ___ (FILED JANUARY 18, 1979). IN GRAY, POLICE WERE GIVEN A DESCRIPTION OF ROBBERS AND STOPPED FOUR INDIVIDUALS, PUT THEM INTO THE POLICE VAN, AND DROVE BACK TO THE SCENE OF THE ROBBERY. JUDGE HESTER SAID:

> NOR DO WE HAVE ANY TROUBLE DECIDING THAT PLACING APPELLANT IN THE POLICE WAGON CONSTITUTED A FULL BLOWN ARREST. SEE, COMMONWEALTH V. HOLMES, ___ PA. ___ (FILED 10/5/78) (DEFENDANT ARRESTED WHEN ESCORTED TO A ROOM BY A POLICE OFFICER AND LOCKED THEREIN); COMMONWEALTH V. ROSCIOLA, 240 PA. S. 135, 361 A.2D 834 (1976) (DEFENDANT ARRESTED WHEN HANDCUFFED); COMMONWEALTH V. KLOCH, 230 PA. S. 563, 327 A.2D 375 (1974) (DEFENDANT ARRESTED WHEN

> PLACED IN TROOPER'S PATROL CAR); COMMONWEALTH V. DOSURGI, 411 PA. 56, 190 A.2D 304 (1963): "AN ARREST MAY BE ACCOMPLISHED BY 'ANY ACT THAT INDICATES AN INTENTION TO TAKE [A PERSON] INTO CUSTODY AND SUBJECTS HIM TO THE ACTUAL CONTROL AND WILL OF THE PERSON MAKING THE ARREST.'" ID. AT ___, 190 A.2D AT 311.
>
> COMMONWEALTH V. GRAY, SUPRA, SLIP OP. AT 2-3, N. 1.

SEE ALSO, COMMONWEALTH V. NORTON, 475 PA. 374, 330 A.2D 769 (1977) (ARREST OCCURRED WHEN POLICE HANDCUFFED DEFENDANT AND GAVE HIM NO INDICATION HE COULD LEAVE POLICE BUILDING). IN LIGHT OF THESE CASES, IT CANNOT BE SERIOUSLY CONTENDED THAT THE POLICE DID NOT ARREST APPELLANT, EVEN THOUGH THE DISTANCE THEY TRANSPORTED HIM WAS A SHORT ONE.

THE CORRECTNESS OF THESE PENNSYLVANIA CASES WAS RECENTLY UNDERSCORED BY THE SUPREME COURT OF THE UNITED STATES IN DUNAWAY V. NEW YORK, 25 CR.L. 3127 (JUNE 5, 1979). THERE, ACTING ON A TIP THAT DID NOT AMOUNT TO PROBABLE CAUSE TO ARREST, THE POLICE "PICKED UP" A SUSPECT AND TOOK HIM TO THE STATION HOUSE FOR INTERROGATION. THE POLICE ADMITTED THAT THE SUSPECT WAS NOT FREE TO LEAVE (AS, HERE, THE MAJORITY "ACCEPT[S] THAT APPELLANT WAS REQUIRED TO ACCOMPANY THE OFFICER FOR THE ONE AND ONE-HALF BLOCK TRIP," SLIP OP. AT 3), BUT ARGUED FOR JUST THE SORT OF INTERMEDIATE RESPONSE (OR "BALANCING TEST", DUNAWAY V. NEW YORK, SUPRA AT 3131) THAT THE COMMONWEALTH URGES HERE. THE SUPREME COURT REJECTED THAT ARGUMENT:

> THE FOURTH AMENDMENT, APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, MAPP V. OHIO, 367 U.S. 643, 81 S. CT. 1684, 6 L.ED. 2D 1081 (1961) PROVIDES: "THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS . . . AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE BUT UPON 'PROBABLE CAUSE. . . .' THERE CAN BE LITTLE DOUBT THAT PETITIONER WAS "SEIZED" IN THE FOURTH AMENDMENT SENSE WHEN

> HE WAS TAKEN INVOLUNTARILY TO THE POLICE STATION. AND RESPONDENT STATE CONCEDES THAT THE POLICE LACKED PROBABLE CAUSE TO ARREST PETITIONER BEFORE HIS INCRIMINATING STATEMENT DURING INTERROGATION. NEVERTHELESS RESPONDENT CONTENDS THAT THE SEIZURE OF PETITIONER DID NOT AMOUNT TO AN ARREST AND WAS THEREFORE PERMISSIBLE UNDER THE FOURTH AMENDMENT BECAUSE THE POLICE HAD A "REASONABLE SUSPICION" THAT PETITIONER POSSESSED "INTIMATE KNOWLEDGE ABOUT A SERIOUS AND UNSOLVED CRIME." BRIEF FOR RESPONDENT AT 10. WE DISAGREE.
>
> Id. AT 3129 (FOOTNOTES OMITTED).

THE COURT REFUSED TO EXTEND TERRY V. OHIO, 392 U.S. 1 (1968), AND ADAMS V. WILLIAMS, 407 U.S. 143 (1972) (UPON WHICH THE MAJORITY RELIES). THE NATURE OF THE INTRUSION IN THOSE CASES, THE COURT SAID, WAS MUCH LESS OFFENSIVE THAN THE INTRUSION FORCED UPON THE DEFENDANT IN DUNAWAY. INDEED, IN NEITHER TERRY NOR ADAMS WAS THERE A TRANSPORTING OF THE DEFENDANTS AWAY FROM THE SPOT WHERE THEY WERE FOUND:

> IN CONTRAST TO THE BRIEF AND NARROWLY CIRCUMSCRIBED INTRUSIONS INVOLVED IN THOSE CASES, THE DETENTION OF PETITIONER WAS IN IMPORTANT RESPECTS INDISTINGUISHABLE FROM A TRADITIONAL ARREST. PETITIONER WAS NOT QUESTIONED BRIEFLY WHERE HE WAS FOUND. INSTEAD, HE WAS TAKEN FROM A NEIGHBOR'S HOME TO A POLICE CAR, TRANSPORTED TO A POLICE STATION, AND PLACED IN AN INTERROGATION ROOM. HE WAS NEVER INFORMED THAT HE WAS "FREE TO GO"; INDEED, HE WOULD HAVE BEEN PHYSICALLY RESTRAINED IF HE HAD REFUSED TO ACCOMPANY THE OFFICERS OR HAD TRIED TO ESCAPE THEIR CUSTODY. THE APPLICATION OF THE FOURTH AMENDMENT'S REQUIREMENT OF PROBABLE CAUSE DOES NOT DEPEND ON WHETHER AN INTRUSION OF THIS MAGNITUDE IS TERMED AN "ARREST" UNDER STATE LAW. THE MERE FACTS THAT PETITIONER WAS NOT TOLD HE WAS UNDER ARREST, WAS NOT "BOOKED," AND WOULD NOT HAVE HAD AN ARREST RECORD IF THE INTERROGATION HAD PROVED FRUITLESS, WHILE NOT INSIGNIFICANT FOR ALL PURPOSES, SEE CUPP V. MURPHY, 412 U.S. 291 (1973), OBVIOUSLY DO NOT MAKE PETITIONER'S SEIZURE EVEN ROUGHLY ANALOGOUS TO THE NARROWLY DEFINED INTRUSIONS INVOLVED IN TERRY AND ITS PROGENY. INDEED, ANY "EXCEPTION"

> THAT COULD COVER A SEIZURE AS INTRUSIVE AS THAT IN THIS CASE WOULD THREATEN TO SWALLOW THE GENERAL RULE THAT FOURTH AMENDMENT SEIZURES ARE "REASONABLE" ONLY IF BASED ON PROBABLE CAUSE.
>
> DUNAWAY V. NEW YORK, SUPRA, AT 3130.

THE MAJORITY FINDS SUPPORT FOR ITS "INTERMEDIATE RESPONSE" THEORY IN TWO CASES OF THIS COURT. HOWEVER, ONE, COMMONWEALTH V. LESEUER, 252 PA. SUPERIOR CT. 498, ___ A.2D ___ (1977), IS INAPPLICABLE. IN THAT CASE, THE MAJORITY HELD THAT PROBABLE CAUSE TO ARREST EXISTED. THEREFORE, THE QUESTION WE FACE HERE WAS SOLVED AT THE OUTSET. IT IS TRUE THAT IN DISSENT I ARGUED FOR WHAT MIGHT BE CALLED AN INTERMEDIATE RESPONSE, BUT I IN NO WAY INDICATED THAT SUCH A RESPONSE COULD ENCOMPASS TAKING THE DEFENDANTS AWAY. INDEED, THAT WAS PRECISELY WHAT I OBJECTED TO. INSTEAD, I ARGUED FOR EXACTLY WHAT I URGE HERE: THAT THE POLICE, INSTEAD OF TRANSPORTING SUSPECTS, USE THEIR INVESTIGATORY SKILLS AT THE SPOT WHERE THEY FIND THE SUSPECTS. HERE, THE PUTATIVE OWNER OF THE CAMEL COLORED HAT WAS ONE AND ONE-HALF BLOCKS AWAY FROM APPELLANT. THERE IS NO REASON WHY THE POLICE COULD NOT HAVE PROTECTED THEIR INVESTIGATION, AND APPELLANT'S RIGHTS TOO, BY ASKING THE OWNER TO TRAVEL THE ONE AND ONE-HALF BLOCKS TO IDENTIFY THE CAP. TERRY WOULD CERTAINLY ALLOW SUCH A BRIEF, ON-THE-SPOT DETENTION OF APPELLANT.

COMMONWEALTH V. HARPER, 248 PA. SUPERIOR CT. 344, 375 A.2D 129 (1977), PROVIDES MORE SUPPORT FOR THE MAJORITY, BUT IS READILY DISTINGUISHABLE. THERE, THE POLICE HAD PROBABLE CAUSE TO BELIEVE THAT THE PERPETRATORS OF A CRIME WERE AMONG THE PASSENGERS ON A BUS. ALL THOSE ON THE BUS WHO FIT THE DESCRIPTION WERE TAKEN TO THE HOSPITAL, WHERE THE VICTIM IDENTIFIED THE DEFENDANT. AS THE

OPINION NOTES, AT LEAST THE POLICE KNEW THEY HAD PROBABLE CAUSE TO ARREST SOMEBODY IN THE GROUP; FURTHERMORE, THE VICTIM COULD NOT COME TO THE SCENE. HERE, HOWEVER, THERE WAS NO SUCH NEATLY DESCRIBED CLASS DEFINITELY INCLUDING THE PERPETRATORS, AND THE OWNER OF THE HAT WAS READILY AVAILABLE TO COME TO THE SITE.[1]

HAVING DECIDED THAT THE POLICE ARRESTED APPELLANT, I NEXT ASK WHETHER THERE WAS PROBABLE CAUSE FOR THIS ARREST. THE POLICE WERE TOLD ONLY THAT "MALES" WERE SEEN WITH APPARENTLY STOLEN PROPERTY; FROM FOOTPRINTS IN THE MUD, THE POLICE COULD ALSO PRESUME THAT THE CULPRITS WOULD HAVE MUDDY SHOES. THEY STOPPED APPELLANT AND HIS COMPANIONS, ALTHOUGH THEY DID NOT KNOW HOW MANY MEN WERE INVOLVED, THEIR AGES, THEIR RACES, OR ANY OTHER ITEM OF DESCRIPTION. THE GROUP WAS STOPPED A BLOCK AND A HALF FROM THE SCENE OF THE CRIME, AND ABOUT 25 MINUTES AFTER THE CALL ABOUT THE "MALES" CAME OVER THE RADIO. I SUBMIT THAT NOTHING CONCLUSIVE -- OR EVEN STRONGLY PROBATIVE -- CAN BE DEDUCED FROM APPELLANT'S LOCATION IN MID-AFTERNOON IN A RESIDENTIAL AREA. THE MOST PROBATIVE FACT WAS THAT APPELLANT AND HIS TWO FRIENDS HAD MUD ON THEIR SHOES. YET THE OFFICER TESTIFIED THAT THE AREA INCLUDED MANY HOUSES WITH BACK YARDS, AND A DEMOLITION SITE THAT WOULD HAVE HAD "SOME" DIRT, N.T. SUPPRESSION HEARING AT 17, 21. APPELLANT COULD PRODUCE NO IDENTIFICATION, SEEMED "EVASIVE," AND HAD A HAT IN A BAG. THESE FACTS DO NOT AMOUNT TO PROBABLE CAUSE TO ARREST.[2] THE MAJORITY, BY ANALYZING THE ISSUE IN TERMS OF WHETHER THE POLICE

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1. I EXPRESS NO OPINION WHETHER, IN LIGHT OF DUNAWAY V. NEW YORK, SUPRA, COMMONWEALTH V. HARPER REMAINS GOOD LAW.

2. SINCE THE FRISK, WHICH YIELDED A MAN'S RING AND OLD DIME, WAS CONDUCTED INCIDENT TO THE DECISION TO LOAD THE THREE INTO THE POLICE VAN, THOSE ITEMS -- ASSUMING THEY WERE PROBATIVE -- MAY NOT BE CONSIDERED IN DETERMINING THE QUESTION OF PROBABLE CAUSE TO ARREST.

WERE PERMITTED TO TRANSPORT APPELLANT ON LESS THAN THE QUANTUM OF PROOF NECESSARY TO SUPPORT A FULL ARREST, APPARENTLY CONCEDES AS MUCH.

THE PHYSICAL EVIDENCE AND APPELLANT'S STATEMENTS BEING FRUITS OF AN UNLAWFUL ARREST, I SHOULD REVERSE THE JUDGMENT OF SENTENCE AND REMAND FOR A NEW TRIAL.

HOFFMAN, J., JOINS IN THIS DISSENTING OPINION.

82-918

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. ___

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

VS.

ANDRE LOVETTE AND SIMONA LOVETTE,
Representative of the Estate Of
Andre Lovette, Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

BRIEF FOR RESPONDENT, ANDRE LOVETTE, IN OPPOSITION

JOHN W. PACKEL, Assistant Defender
Chief, Appeals Division
BENJAMIN LERNER, Defender

Defender Association of Philadelphia
121 North Broad Street
Philadelphia, Pennsylvania 19107

December, 1982

I. QUESTIONS PRESENTED

1. Is not this criminal case moot as the defendant - respondent is deceased, and does not this Court lack jurisdiction to hear this matter?

2. Since the judgment of the court below rests on an adequate and independent state ground, is there not a lack of jurisdiction to hear this case, and should not certiorari be denied?

3. Should not certiorari be denied because it is unnecessary to reach the allegedly important federal constitutional questions involved in this case given that respondent's dentention was constitutionally invalid from the outset, not being authorized by Terry v. Ohio, 392 U.S. 1 (1968), and its progeny?

II. PARTIES TO THE PROCEEDING

The only parties to the proceeding in the courts of Pennsylvania were the Commonwealth of Pennsylvania and the defendant in this criminal action, respondent, Andre Lovette, who died on June 6, 1980. The caption of the case was Commonwealth v. Andre Lovette, Pa., 450 A.2d 975 (1982).* In this Court, the Commonwealth of Pennsylvania, without motion, has attempted to add deceased respondent Andre Lovette's mother, Simona Lovette,** as a party, by including her in the caption of the case and listing her as a respondent.

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* The reported decision of this case in the Pennsylvania Supreme Court is attached as Exhibit "A".

** After learning of the death of respondent, Andre Lovette, the Commonwealth of Pennsylvania filed a petition to abate the pending appeal with the Supreme Court of Pennsylvania (attached as Exhibit "B"). Counsel for Andre Lovette responded to that petition citing a number of reasons, and substantial Pennsylvania authority, for resolving the questions then pending before the court despite the death of the defendant. One suggestion made by counsel was that a substitution of parties might be appropriate under Pennsylvania law, and counsel did request, in its answer to the Commonwealth's Petition to Abate, that Simona Lovette be substituted, as a party, for Andre Lovette. The Supreme Court of Pennsylvania denied the Commonwealth's Petition to Abate without ordering the substitution of parties and proceeded to decide the case on the merits with the two original parties, the Commonwealth of Pennsylvania and Andre Lovette. The Defender Association of Philadelphia, counsel for the deceased respondent, Andre Lovette, was his appointed counsel for all proceedings in the state courts. The Defender Association of Philadelphia has not been appointed counsel to represent Simona Lovette who was not at any time a party to the proceedings below.

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V. JURISDICTION

There is no jurisdiction to hear this matter since there is no case or controversy as required by Article III of the Constitution, the death of respondent, Andre Lovette, having rendered this matter moot. See infra, p. 13-15.

Furthermore, there is no jurisdiction for this Court to review the judgment in this matter, because that judgment rests on an adequate and independent state ground, and the Commonwealth of Pennsylvania is seeking an advisory opinion. See infra, p. 15-17.

VI. CONSTITUTIONAL PROVISIONS INVOKED

United States Constitution, Article III, Sections 1 and 2 provide:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in the office.
>
> Section 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constiution, the Law of the United States, and treaties made, or which shall be made, under this Authority; - to all Cases affecting Ambassadors, other public ministers and consuls; - to all cases of admiralty and maritime jurisdiction; - to Controversies to which the United States shall be a Party, - to Controversies between two or more States; - between a State and Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all cases affecting ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been comitted; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution, Amendment Four, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Fourteen, Section One, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. STATEMENT OF THE CASE

Andre Lovette, "respondent,"* was charged with burglary theft, and receiving stolen property by the district attorney of Philadelphia in Information No. 1673 of December Sessions, 1976. Respondent filed a timely pre-trial motion to suppress physical evidence and statements, and a hearing was held on January 21, 1977.

The only witness who testified at the hearing on the motion to suppress evidence was the arresting officer, James McCoy. Officer McCoy testified that on December 15, 1976 about 3:15 P.M.** he was in a patrol wagon and went to a vacant house at 5115 Willows Avenue in Philadelphia in response to a police radio call from an anonymous source, which said that there were males with property inside. Inside that vacant house Officer McCoy found no people, but did observe stereo equipment, clothing, pottery and other items. He noticed that across the driveway at 748 S. 51st a rear door was broken down and that the hinges were knocked off. He went into this house about 3:25 P.M. and found drawers ajar, and items strewn all over the floors. Officer McCoy contacted a supervisor, and about 15 or 20 minutes later the complainant, Harold Bennet, arrived and told the officer that it was his house, that he had left it at 10:30 or 11:00 in the morning and that he had given nobody permission to enter the house in his absence (N.T. 4-5, 8-9).

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* "Respondent" will be used to designate Andre Lovette, the defendant in this criminal case. The additional respondent now added in the caption of the case, Simona Lovette, has nothing to do with the factual history of this case, and will be referred to as "Mrs. Lovette."

** At one point in the notes of testimony, the time is indicated as 5:15 P.M. (N.T. 4), but later testimony indicates that the officer must have meant to say 3:15 P.M., given the other periods of time to which he testified (N.T. 8, 9, 19). "N.T." refers to the transcript of the testimony from the hearing on the motion to suppress evidence and trial, which is contained in a single volume.

Officer McCoy noticed that the rear of the house had a plot of dirt, which was muddy, because it had rained a day or two earlier, and that there were footprints leading to and from the rear of Mr. Bennett's house to the vacant property where various items were found. This was a residential area with many such rear yards. Officer McCoy got into his patrol wagon and drove a block and a half away, where he saw three men, one of whom was respondent, standing at 52nd and Willows Street, near an area which is a concrete and dirt vacant lot. Officer McCoy stopped these men because they had dirt and mud on their shoes. He asked respondent about the mud on his shoes and he responded that he had probably walked through dirt or in a field during the course of the day (N.T. 10, 12, 15, 17, 20-21).

Officer McCoy considered this answer evasive, and then asked respondent what he had in a closed paper bag that he was carrying. Respondent told him a hat, and then opened the bag at the officer's request and showed him that it did in fact contain a hat. When asked whose hat it was, he responded that it belonged to a friend of his. Officer McCoy then placed respondent and the other two males in the police wagon because, from the mud on their shoes and the answers given to his questions, he decided he wanted to take them to the complainant's house to see if the complainant could identify any property that they had (N.T. 11-13).

Officer McCoy "patted down" respondent and the other two males upon placing the three men in the patrol wagon. He found that one of the males had a ring and a silver dime in his possession. Officer McCoy drove the three males to the complainant's house a block and a half away, and at that time the complainant identified the hat, ring, and dime as items that were taken from his

house. Respondent and the other two men were taken to the police station (N.T. 14-16).

The motion to suppress was denied, and the case proceeded to trial without a jury, after respondent waived his right to a jury trial. The only other witness at trial was the complainant, Harold Bennett, who testified that the hat seized from respondent was similar in age, color and shape to a hat that had been left at his house by a friend, before the burglary, and was missing after the burglary (N.T. 40-51, 55-60).

Respondent was convicted of all charges. He filed motions in support of post-verdict relief. A hearing was held on his claim of after-discovered evidence, and the complainant, Harold Bennett, testified that after the trial the hat belonging to his friend was found, and that he realized that he was mistaken at trial when he identified the hat seized by police from respondent as belonging to his friend, as it definitely was not taken from his house (P.T.H. 3-7, 14, 16-18, 28, 36).* Post-verdict relief was denied, and respondent was sentenced to a term of imprisonment of from four to twenty three months.

A timely appeal was taken by respondent to the Superior Court of Pennsylvania, and on August 24, 1979, a majority of that court affirmed his judgment of sentence. A timely petition for allowance of appeal was then filed to the Pennsylvania Supreme Court which granted the petition. While respondent's appeal was pending in the Pennsylvania Supreme Court, he died, and the Commonwealth of Pennsylvania filed a petition to abate the appeal (See Exhibit "B"). That petition was denied, and on October 5, 1982, the Pennsylvania

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* "P.T.H." is used here to designate the notes of testimony from the hearing on post-trial motions which was held on June 28, 1977.

Supreme Court reversed respondent's judgment of sentence and awarded a new trial on the ground that the pre-trial suppression motion was incorrectly denied. The Court noted in its opinion that because of that disposition it did not need to consider the merits of his after-discovered evidence claim. The Commonwealth of Pennsylvania now seeks this Court's review of the judgment of the Pennsylvania Supreme Court.

VIII. REASONS FOR DENYING THE WRIT

A. Mootness

This is a criminal case, and the defendant - respondent, has died. He died while his appeal was pending in the Pennsylvania Supreme Court. The Pennsylvania appellate courts, contrary to this Court, the lower federal courts, and almost every state appellate court in the country, (See Exhibit "B") does not necessarily consider an appeal in a criminal case moot when the defendant has died. Commonwealth v. Walker, 447 Pa. 146, 288 A.2d 741 (1972). See Janet D. v. Carros, 240 Pa. 291, 311, 362 A.2d 1060, 1070 (1976). See also In Re Gross, 476 Pa. 203, ___, 382 A.2d 116, 122-23 (1978); Meyer v. Strouse, 422 Pa. 136, 138, 221 A.2d 191, ___ (1966).

The Pennsylvania Supreme Court, therefore, as a matter of state law, denied the Commonwealth of Pennsylvania's petition to dismiss the appeal on mootness grounds, and proceeded to rule on the merits of the case, reversing the deceased respondent's judgment of sentence and awarding him a new trial.

It is now irrelevant that as a matter of state law this case was not considered moot, because Article III of the United States Constitution requires that there be in existence a case or controversy, thus "even in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." DeFunis v. Odegaard, 416 U.S. 312, 316, 94 S.Ct. 1704, 1706 (1974), quoting North Carolina v. Rice, 404 U.S. 244, 246, 92 S.Ct. 402, 404 (1971).

In this criminal case it is clear that there is now no case or controversy because of the death of the defendant - respondent, as this Court has consistently held that under such circumstances the action is moot and certiorari will be

denied or an appeal will be dismissed. See e.g. Dove v. United States, 423 U.S. 325, 96 S.Ct. 579 (1976); Hampton v. Ditty, 414 U.S. 885, 94 S.Ct. 219 (1973); Miller v. Ohio, 404 U.S. 1011, 92 S.Ct. 700 (1972); Garvin v. Cochran, 371 U.S. 27, 83 S.Ct. 122 (1962); Gersewirtz v. New York, 326 U.S. 687, 66 S.Ct. 89 (1945); Johnson v. Tennessee, 214 U.S. 485, 29 S.Ct. 651 (1909); List v. State of Pennsylvania, 131 U.S. 396, 9 S.Ct. 794 (1888).

In Pennsylvania v. Linde, 409 U.S. 1031, 93 S.Ct. 523 (1972), the state of Pennsylvania, as it does here, sought certiorari in a case where a defendant in a criminal case had been awarded a new trial by the Pennsylvania Supreme Court. When the defendant died while Pennsylvania's petition was pending, this Court dismissed its petition for certiorari. This case, like Pennsylvania v. Linde, involves only a single defendant, now deceased, and the Commonwealth of Pennsylvania, thus there can be no asserted interests of a class, as in a class action suit, that might survive the death of respondent. See DeFunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704 (1974); Brockington v. Rhodes, 396 U.S. 41, 90 S.Ct. 206 (1969). See and compare Richardson v. Ramirez, 418 U.S. 24, 94 S.Ct. 2655 (1974).

Since this Court reviews judgments, and not opinions, it is difficult to discern the relief which can be awarded to the state if the Pennsylvania Supreme Court's grant of a new trial to this deceased respondent is overturned. The reinstatement of the judgment of sentence would be a futile act since respondent will be unable to serve it, and there can be no collateral consequences against him in future criminal proceedings. See and compare Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977). In an attempt to avoid a denial of certiorari on mootness grounds, Pennsylvania has added respondent's mother, Simona Lovette, his personal

representative, as party, but it has asserted no potential or actual claim it will have against her or his estate* if the grant of a new trial is reversed and respondent's judgment of sentence is reinstated by this Court. Mrs. Lovette obviously cannot be forced to serve a prison sentence on behalf of her deceased son.

What is sought here by the Commonwealth of Pennsylvania given the lack of a case or controversy, is an advisory opinion, and the "oldest and most consistent thread in the federal law of justiciability is ... that the federal courts will not give advisory opinions." Flast v. Cohen, 392 U.S. 83, 96, 88 S.Ct. 1942, 1950 (1968). The petition for writ of certiorari should be denied.

B. Adequate And Independent State Ground

This Court has consistently held that if the judgment of the court below appears that it might have been based on non-federal grounds there is no jurisdiction, as the petitioner for certiorari must establish that a state ground cannot account for the decision below. Durley v. Mayo, 351 U.S. 277, 281, 76 S.Ct. 806, 809 (1956). This is because the power of this Court is limited to correcting wrong judgments, not revising opinions, thus there is no jurisdiction if the same judgment would be rendered by a state court even if this Court corrected its view of federal law. Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463 (1945).

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* Respondent died intestate, and left no estate. See affidavit of counsel in support of petition to proceed in forma pauperis. Even if this Court granted certiorari and reversed the grant of a new trial awarded by the Pennsylvania Supreme Court that would not be the end of litigation involving this dead defendant because the case would have to be remanded to the Pennsylvania Supreme Court for consideration of respondent's claim that he was entitled to a new trial because of after discovered evidence, a claim arising under state law that the Pennsylvania Supreme Court did not reach because it was not necessary given its disposition of the suppression issue. Commonwealth v. Lovette, Pa., 450 A.2d 975, 976, n. 1 (1982).

Because the judgment of the Pennsylvania Supreme Court rests on an adequate and independent ground of state law, this Court should deny the petition for certiorari.

The states are, of course, free to grant those accused or suspected of crime with rights greater than those required to be granted by the United States Constitution, and the Pennsylvania Supreme Court in a variety of contexts has often extended such protections not required by the United States Constitution pursuant to its supervisory powers over state criminal proceedings.* It is thus clear that a state, as a matter of state law, may impose greater restrictions on police and afford greater protections to its citizens when it defines what constitutes an arrest, and determines the lawfulness of arrests by state officers for state offenses. See e.g. Ker v. State of California, 374 U.S. 23, 37, 83 S.Ct. 1623, 1632 (1963); United States v. Di Re, 332 U.S. 581, 589, 68 S.Ct. 222, 226 (1948); Street v. Surdyka, 492 F.2d 368, 372 (4th Cir. 1974). Whether or not the judgment of the Pennsylvania Supreme Court in this case was required by the United States Constitution is a question which this Court should not decide, since the Pennsylvania Supreme Court held, as a matter of state law, that respondent's arrest was illegal, and suppressed the fruits of that arrest.

Citing a long line of Pennsylvania cases, beginning with Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963), which defines an arrest in Pennsylvania "as any act that indicates an intention to take the person into custody and subjects him to the actual control and will of the person making the arrest," the Pennsylvania Supreme Court

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* E.g., Commonwealth v. Davenport, 471 Pa. 278, 370 A.2d 301 (1977); Commonwealth v. Campana, 455 Pa. 622, 624, 314 A.2d 854, 855 (1974); Commonwealth v. Milliken, 450 Pa. 310, 315, 300 A.2d 78, 81 (1973); Commonwealth v. Hamilton, 449 Pa. 297, 308-09, 297 A.2d 127, 132-33 (1972).

decided "that the placing of appellant and his companions in the police vehicle for the purpose of transporting them to the scene of the offense, without their consent, constituted an arrest as that term has been defined under our cases." Commonwealth v. Lovette, Pa., 450 A.2d 975, 978 (1982). The Pennsylvania Supreme Court's opinion then contains an extended analysis of whether the seizure of respondent also violated the Fourth Amendment of the United States Constitution. It concluded by holding that the action of the police constituted an illegal arrest under Pennsylvania law, and may also have been unconstitutional.

> Consequently, we must conclude that the constitutional validity of the seizure of the person of appellant in this case is at best dubious. Since the seizure unquestionably constituted an arrest as defined in this jurisdiction which requires probable cause, we are not persuaded that we should, on this record, depart from that longstanding respected precedent. Accordingly, we hold that the seizure of appellant without probable cause constituted an illegal arrest and that the identification of the hat during that illegal seizure should have been suppressed. Commonwealth v. Lovette, Pa., 450 A.2d 975, 981 (1982).

Because the judgment of the Pennsylvania Supreme Court rests on an adequate and independent state ground this Court should deny Pennsylvania's petition for a writ of certiorari.

C. Lack Of Necessity To Reach Constitutional Issue Presented

The Commonwealth of Pennsylvania seeks certiorari to have this Court decide constitutional questions concerning the limits on police conduct when an individual has been lawfully stopped and detained but there is no probable cause to arrest that person. Because this case involves a stop and detention constitutionally impermissible under Terry v.

Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), and its progeny,* this case does not provide an appropriate vehicle for resolving the questions presented by the Commonwealth of Pennsylvania.

For any seizure of the person involving a stop or comparable intrusion on an individual's liberty this Court has held that the Fourth Amendment requires that the police officer must be able to point to specific and articulable objective facts for suspecting the individual of criminal activity. E.g., Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587 (1981); Terry v. Ohio, supra.

In this case police knew that a house had been burglarized sometime within the last few hours, and an anonymous radio call indicated that males had been seen in a vacant house with property. Police had no description of the property taken, or the males involved. Behind the burglarized house there was a muddy backyard with footprints leading to the vacant house where property was found. This was a residential area with many such backyards, and it had rained a day or two earlier.

Twenty minutes after police arrived at the scene of the burglarized house, respondent and two other men at a corner a block and a half from the scene of the burglary and near a vacant lot were stopped and detained solely because they had dirt and mud on their shoes. Respondent and the other men were not acting suspicious or unusual, as it was only the appearance of their shoes that led to their detention.

Since the mud and dirt on their shoes could have come from any number of sources other than the backyard of the

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* This issue was raised by respondent in the Pennsylvania courts. Respondent can assert any ground in support of the judgment below. See e.g., Jaffke v. Dunham, 352 U.S. 280, 77 S.Ct. 307 (1957); Walling v. General Industries Co., 330 U.S. 545, 67 S.Ct. 883 (1947).

burglarized premises, it is clear that if detaining respondent and the other men was constitutionally permissible then every male in the neighborhood of the burglary with mud and dirt on his shoes could also have been detained. The United States Constitution has never been interpreted to permit such dragnet seizures of individuals in the areas of crimes who are not acting in at least a suspicious manner. Therefore, because the stop and detention of respondent was constitutionally impermissible, this Court should not grant certiorari since the constitutional questions* raised by the Commonwealth concerning the scope of police conduct during a proper detention would not have to be reached.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN W. PACKEL

Counsel For Respondent

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* The Commonwealth of Pennsylvania, by citing to cases involving a variety of different detentions, including an airport concourse and offices, which are dissimilar to what occurred here, inadvertently emphasizes exactly why certiorari should be denied in a case like this. The constitutional appropriateness of the detentions in such cases is best resolved on a case by case basis dependent on the particular factual situation.

COMMONWEALTH of Pennsylvania

v.

Andre LOVETTE, Appellant.

Supreme Court of Pennsylvania.

Argued April 15, 1982.

Decided Oct. 5, 1982.

Defendant was convicted in the Court of Common Pleas, Philadelphia County, Trial Division, Criminal Section, Information No. 1673, December Term, 1976, Snyder, J., of burglary, theft and receiving stolen property, and he appealed. The Superior Court, No. 2366 October Term, 1977, Cercone, President Judge, 271 Pa.Super. 250, 413 A.2d 390, affirmed, and defendant again appealed. The Supreme Court, No. 497 January Term, 1979, Nix, J., held that: (1) evidence was sufficient to support defendant's conviction, but (2) placing defendant and his companions in police vehicle for purpose of transporting them to scene of offense, without their consent and without exigent circumstances to support action, constituted illegal arrest without probable cause, notwithstanding that seizure was inspired to serve investigative purposes rather than to arrest and charge suspect.

Judgment of sentence reversed, new trial awarded.

Roberts, J., filed concurring opinion in which Flaherty, J., joined.

McDermott, J., filed dissenting opinion.

1. Criminal Law ⇐1144.13(4, 5), 1159.2(7)

Test for sufficiency of evidence is whether, accepting as true all of evidence reviewed in light most favorable to Commonwealth, together with all reasonable inferences therefrom, trier of fact could have found that each element of offenses charged was supported by evidence and inferences sufficient in law to prove guilt beyond reasonable doubt.

2. Criminal Law ⇐1134(2)

Claim of insufficiency of evidence will not be assessed on diminished record, but rather on evidence actually presented to finder of fact rendering questioned verdict.

3. Criminal Law ⇐552(1)

Fact that evidence establishing defendant's participation in crime is circumstantial does not preclude conviction where evidence coupled with reasonable inferences drawn therefrom overcome the presumption of innocence.

4. Burglary ⇐42(3)
Larceny ⇐64(7)

Possession of fruits of burglary by defendant and his companions within block and a half from situs of crime, with his clothing and that of his companions in condition compatible with recent visit to scene of crime within half an hour of discovery of crime was sufficient to support conviction of burglary and theft by unlawful taking.

5. Arrest ⇐63.4(1)

One may not be arrested without probable cause.

6. Arrest ⇐68

Placing defendant and his companions in police vehicle for purpose of transporting them to scene of offense, without their consent, constituted "arrest" and was "seizure of the person" within meaning of Fourth Amendment. U.S.C.A.Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

7. Arrest ⇐68
Criminal Law ⇐394.4(9)

Placing defendant and his companions in police vehicle for purpose of transporting them to scene of offense, without their consent and without exigent circumstances, constituted illegal arrest without probable cause and identification of hat during illegal seizure should have been suppressed, notwithstanding that seizure was inspired to serve investigative purposes rather than to arrest and charge suspect. U.S.C.A. Const.Amend. 4.

EXHIBIT "A"

John W. Packel, Chief, Appeals Div., Leonard Sosnov, Philadelphia, for appellant.

Robert B. Lawler, Chief, Appeals Div., Mark Gurevitz, Philadelphia, for appellee.

Before O'BRIEN, C. J., and ROBERTS, NIX, LARSEN, FLAHERTY, McDERMOTT and HUTCHINSON, JJ.

OPINION

NIX, Justice.

In this appeal appellant seeks in the alternative discharge or the award of a new trial. In the first instance it is contended the evidence presented against appellant was insufficient as a matter of law to sustain the conviction. The alternative position, that at the very least the judgment of sentence must be vacated and a new trial awarded, is predicated upon the claims that the court erred in denying the suppression motion and the rejection of after-discovered evidence was improper. Although we do not accept appellant's assertion as to the insufficiency of the evidence, we do agree that he is entitled to a new trial because of an erroneous ruling on the suppression motion.[1]

On December 15, 1976 at 3:15 p. m. Officer James McCoy, a member of the Philadelphia Police Department, was dispatched to 5115 Willows Avenue in response to an anonymous call to investigate "males with stolen property in a vacant house." Upon the arrival of Officer McCoy and his partner at the designated premises, they found stereo equipment, wrapped Christmas gifts, clothing, pottery and other items. Their inspection of the scene revealed across the driveway at 748 South 51st Street a rear door was broken down and that the hinges had been broken off. Officer McCoy entered the home and found drawers ajar and items strewn over the floor. Approximately 10 minutes after the officers' arrival at the scene, Mr. Harold Bennett appeared and identified himself as the owner of 5115 Willows Avenue. He stated that he had left his home between 10:30 a. m. and 11:00 a. m. that morning at which time the property was secured and no one had been given permission to enter in his absence. The examination of the scene also disclosed trails of footprints in a muddy plot of ground between Mr. Bennett's home and the rear of the vacant premise. Mr. Bennett identified the goods found in the abandoned premise as being taken from his home.

Officer McCoy began to patrol the area at which time he observed three males a block and a half from the scene of the burglary. The men attracted his attention because of the mud on their shoes. Appellant, a member of the trio, had a brown paper bag in his hand. The officer approached the group and they made no effort to avoid the encounter. The officer asked for identification and the three men were unable to produce any. The officer asked appellant what was in the bag he was carrying and appellant immediately replied that it contained a hat. Appellant showed the hat to the officer, at the officer's request, and stated that he had received it from a friend. In response to a question concerning the condition of his shoes, appellant stated he had probably walked through dirt or a field.[2]

The officer decided to transport the group to the home of Mr. Bennett for a possible identification. Before placing the men in the police vehicle, the officer conducted a "pat down" search which produced from one of appellant's companions a ring and a silver dime of numismatic value. The complainant identified the hat, ring and silver dime as being items taken from his house. The men were then placed under arrest and charged with burglary and theft by unlawful taking.

1. In view of our disposition, we need not consider the merits of the after-discovered evidence claim.

2. At the time the group was approached, they were standing near an area of a concrete and dirt vacant lot. In the general area there were many dirt rear yards.

After a denial of the pre-trial suppression motion, appellant waived trial by jury and proceeded to trial on the basis of the evidence admitted at the suppression proceeding. The defendant rested without offering a defense and was found guilty as charged. Subsequent to the disposition of post-verdict motions adverse to appellant, a sentence of a term of imprisonment of four to twenty-three months was imposed. The conviction was affirmed by the Superior Court sitting *en banc* by a four to two vote.[3] We granted review.

I. Sufficiency of the Evidence

[1, 2] This claim of appellant is quickly disposed of on the instant record. The test for sufficiency of the evidence is whether accepting as true all of the evidence reviewed in the light most favorable to the Commonwealth, together with all reasonable inferences therefrom, the trier of fact could have found that each element of the offenses charged was supported by evidence and inferences sufficient in law to prove guilt beyond a reasonable doubt. *Commonwealth v. Ransome*, 483 Pa. 490, 402 A.2d 1379 (1979); *Commonwealth v. Sadusky*, 484 Pa. 388, 399 A.2d 347 (1979) *citing Commonwealth v. Sullivan*, 472 Pa. 129, 149-150, 371 A.2d 468, 478 (1977). *See also, Commonwealth v. Horton*, 486 Pa. 115, 401 A.2d 320 (1979); *Commonwealth v. Toney*, 474 Pa. 243, 378 A.2d 310 (1977); *Commonwealth v. Rose*, 469 Pa. 264, 344 A.2d 824 (1975). Moreover, a claim of insufficiency of the evidence will not be assessed on a diminished record, but rather on the evidence actually presented to the finder of fact rendering the questioned verdict. *Commonwealth v. Cohen*, 489 Pa. 167, 413 A.2d 1066 (1980); *Commonwealth v. Kubler*, 484 Pa. 358, 361 n.*, 399 A.2d 116, 117 n.* (1979); *Commonwealth v. Tabb*, 417 Pa. 13, 16, 207 A.2d 884, 886 (1965).

Here there is little question that the Commonwealth produced ample evidence for a finder of fact to conclude that the premises at 748 S. 51st Street had been burglarized and that there was a theft of its contents. Appellant does not challenge the proof of the fact of the burglary or the theft but rather focuses upon the evidence offered to establish his participation. Appellant characterizes the evidence in this regard as merely establishing "appellant's presence with two men, one of whom who possessed stolen property, not visible to appellant, which had been taken in a burglary committed sometime earlier that day, and appellant's possession of a hat which was similar to one taken in that burglary."

Appellant takes too narrow a view of the Commonwealth's evidence presented to establish his guilt. At trial Mr. Bennett testified the hat as having been taken from a bureau drawer in his dining room. That the hat merely resembled a hat taken from the house during the burglary was an inference that the defense urged the fact finder to draw. However, the fact finder was obviously free to accept Mr. Bennett's positive statement that the hat was in fact the one removed from the house. That one of appellant's companions also had on his person property definitely identified as being taken during the same burglary provides a basis for finding the two men as being co-participants. It unquestionably refutes the defense's charge that the evidence did not establish any relationship between him and the other two males he was standing with when approached by Officer McCoy. The condition of the shoes of the trio was consistent with having traversed the area between the burglarized home and the vacant property.

[3, 4] The fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence. *Commonwealth v. Sullivan, supra; Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545 (1976); *Commonwealth v. Cox*, 466 Pa. 582, 353 A.2d 844 (1976); *Commonwealth v. Petrisko*, 442 Pa. 575, 580, 275 A.2d 46, 49 (1971). *See also, Common-*

3. Judge Spaeth joined by Judge Hoffman concluded that the suppression motion should have been granted and that appellant was entitled to a new trial.

wealth v. Tinsley, 465 Pa. 329, 350 A.2d 791 (1976); *Commonwealth v. McIntyre*, 451 Pa. 42, 47, 301 A.2d 832, 834 (1973). We are satisfied that the possession of the fruits of the burglary found on the appellant and his companions within a block and a half from the situs of the crime, with his clothing and that of his companions in a condition compatible with a recent visit to the scene of the crime, within a half an hour of the discovery of the crime supports a finding of guilt. Thus the sufficiency of the evidence claim may properly be dismissed as being without substance.

II. Legality of the Arrest.

[5] Both the Commonwealth and the majority of the Superior Court agreed that the police did not have probable cause for the arrest of appellant and his companions until the owner of the premises identified the hat in appellant's possession and the items taken from his companions as having been taken from the burglarized premises. In this jurisdiction it is clear that one may not be arrested without probable cause. *Commonwealth v. Bartlett*, 486 Pa. 396, 406 A.2d 340 (1979); *Commonwealth v. Stokes*, 480 Pa. 38, 389 A.2d 74 (1978); *Commonwealth v. Dickerson*, 468 Pa. 599, 364 A.2d 677 (1976); *Commonwealth v. Farley*, 468 Pa. 487, 364 A.2d 299 (1976); *Commonwealth v. Culmer*, 463 Pa. 189, 344 A.2d 487 (1975); *Commonwealth v. Jackson*, 459 Pa. 669, 331 A.2d 189 (1975); *Commonwealth v. Ruso*, 459 Pa. 21, 326 A.2d 340 (1974). We have defined an arrest as any act that indicates an intention to take the person into custody and subjects him to the actual control and will of the person making the arrest. *Commonwealth v. Boyarp*, 411 Pa. 56, 190 A.2d 304 (1963). *See also, Commonwealth v. Nelson*, 488 Pa. 148, 411 A.2d 740 (1980) *citing Steding v. Commonwealth*, 480 Pa. 485, 391 A.2d 989 (1978) and *Commonwealth v. Brown*, 230 Pa. Superior Ct. 214, 326 A.2d 906 (1974); *Commonwealth v. Silo*, 480 Pa. 15, 389 A.2d 62 (1978), *certiorari denied Silo v. Pennsylvania*, 439 U.S. 1132, 99 S.Ct. 1053, 59 L.Ed.2d 94, *rehearing denied* 440 U.S. 969, 99 S.Ct. 1522, 59 L.Ed.2d 785 (1978); *Commonwealth v. Richards*, 458 Pa. 455, 327 A.2d 63 (1974).

The question raised is whether placing appellant in a police vehicle, after a "pat down" search and transporting him to the scene of the burglary constituted an arrest. There is no dispute that the officers intended to exercise control over appellant and his companions at least until Mr. Bennett had an opportunity to view the objects found in their possession. There is no contention that appellant voluntarily accompanied the officer to the scene of the burglary. *See, e.g., Commonwealth v. Richards, supra.*

[6] Under all of the circumstances, it is clear that the placing of appellant and his companions in the police vehicle for the purpose of transporting them to the scene of the offense, without their consent, constituted an arrest as that term has been defined under our cases. It is equally true that police action was a seizure of the person within the meaning of the Fourth Amendment of the federal Constitution. *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

Conceding, implicitly, the longstanding tradition in this Commonwealth that an arrest must be supported by probable cause, it is being urged that the seizure is constitutionally permissible and that the law of this Commonwealth must accommodate this legitimate effort to enhance the capabilities of law enforcement to deter, to ferret out and to punish those who would disregard our laws. We are satisfied that the constitutional validity of the instant seizure is at best dubious and that it does not warrant a departure from the longstanding tradition that an arrest must be supported by probable cause.

Traditionally, it was accepted that seizures of the person were required by the Fourth Amendment to be based upon probable cause. This principle was followed without exception. *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); *Johnson v. United States*, 333 U.S.

10, 68 S.Ct. 367, 92 L.Ed. 436 (1947); *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1947); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924). *See also, United States Ex Rel. Wright v. Cuyler*, 563 F.2d 627 (3d Cir. 1977); *United States v. Embry*, 546 F.2d 552 (3d Cir. 1976).

> The "long-prevailing standards" of probable cause embodied "the best compromise that has been found for accommodating [the] often opposing interests" in "safeguard[ing] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949). The standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment. The standard applied to all arrests, without the need to "balance" the interests and circumstances involved in particular situations. *Cf. Camara v. Municipal Court*, 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967).
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> *Dunaway v. New York*, 442 U.S. 200, 208, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979).

The first recognition that the Fourth Amendment reasonableness requirement could be satisfied by a showing of something less than probable cause was announced by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The *Terry* decision and its progeny[4] stated "that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." *Michigan v. Summers*, *supra*, 452 at 699, 101 S.Ct. at 2592, 69 L.Ed.2d at 348.

However, the Court has admonished us to be mindful that the *Terry* principle is an exception to the general rule requiring probable cause and must not be extended in such a fashion as to swallow the rule. *Dunaway v. New York*, *supra*. In *Dunaway* the Court stressed the importance of the general rule requiring probable cause to satisfy the reasonableness test of the Fourth Amendment.

> The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. "The requirement of probable cause has roots that are deep in our history." *Henry v. United States*, 361 U.S. 98, 100, 4 L.Ed.2d 134, 80 S.Ct. 168 [169] (1959). Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest." Id., at 101 [4 L.Ed.2d at 138, 80 S.Ct at 170]. (footnotes omitted). The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the "reasonableness" requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule. *See Brinegar v. United States*, *supra*, [338 U.S.] at 176–176, 93 L.Ed. 1879, 69 S.Ct. 1302.
>
> *Id.* 442 U.S. at 213, 99 S.Ct. at 2257.

In its analysis in this case the Commonwealth stresses the utility to criminal investigations that is provided by these seizures without the need for establishing probable cause. This ignores the clearly defined test

4. *See Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981); *Penna v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

for ascertaining the appliability of the probable cause requirement. " . . . [I]n order to decide whether . . . [a] case is controlled by the general rule, it is necessary to examine *both* the character of the official intrusion and its justification." [Emphasis added.] *Michigan v. Summers*, *supra*, 452 U.S. at 701, 101 S.Ct. at 2593, 69 L.Ed. at 348–49. Using the proper analysis we cannot conclude that the instant seizure is so clearly within the *Terry* exception as to warrant a deviation in this case from this jurisdiction's longstanding rule of arrest based upon a proper showing of probable cause.

Because the seizure was inspired to serve investigative purposes rather than to arrest and charge the suspect does not, by that fact alone, justify application of the *Terry* exception. *Dunaway v. New York*, *supra*.

> "[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'"
>
> *Davis v. Mississippi*, 394 U.S. 721, 726–27, 89 S.Ct. 1394, 1397, 22 L.Ed.2d 676 (1969).

A similar argument was again rejected in *Dunaway* where that Court observed:

> In effect, respondent urges us to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." [Citation omitted.] A single familiar standard is essential to guide police, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. [Footnotes omitted.]
>
> *Id.*, 442 U.S. at 213–214, 99 S.Ct. at 2257.

The *Terry* exception has been most frequently applied in instances involving merely an involuntary detention, *see, e.g. Commonwealth v. Anderson*, 481 Pa. 292, 392 A.2d 1298 (1978); *Commonwealth v. Jones*, 474 Pa. 364, 378 A.2d 835 (1977); *Commonwealth v. Mimms*, 471 Pa. 546, 370 A.2d 1157 (1977); *Commonwealth v. Bailey*, 460 Pa. 498, 333 A.2d 883 (1975); *Commonwealth v. Richards*, *supra*; *Commonwealth v. Pollard*, 450 Pa. 138, 299 A.2d 283 (1973); *Betrand Appeal*, 451 Pa. 381, 303 A.2d 486 (1973); *Commonwealth v. Garvin*, 449 Pa. 258, 293 A.2d 21 (1972); *Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969). Here we have the added element of a transportation of the suspects from the place of the initial encounter without exigent circumstances to support that action. The police had the option of detaining the suspects at the site of the initial encounter and either bringing the complainant to the site for his identification of the questioned articles or taking those items to him. Either situation would present a much stronger case for the position the Commonwealth presently urges. The Commonwealth stresses the limited area traversed in the transportation of appellant. This fact only highlights the ease with which the identification could have been made without the movement of the suspects, which increased the intrusiveness of the encounter. The instant factual situation is also illustrative of the uncertainties attendant to any attempt to expand the *Terry* exception and reinforces the wisdom of scrupulously adhering to the narrow scope of the exception. *Dunaway v. New York*, *supra*.

[7] Consequently, we must conclude that the constitutional validity of the seizure of the person of appellant in this case is at best dubious. Since the seizure unquestionably constituted an arrest as defined in this jurisdiction which requires probable cause, we are not persuaded that we should, on this record, depart from that longstanding respected precedent. Accordingly, we hold that the seizure of appellant without probable cause constituted an illegal arrest and that the identification of the hat during that illegal seizure should have been suppressed.

The Judgment of Sentence is reversed and a new trial awarded.

ROBERTS, J., filed a concurring opinion.

FLAHERTY, J., joined in this opinion and the concurring opinion of ROBERTS, J.

McDERMOTT, J., filed a dissenting opinion.

ROBERTS, Justice, concurring.

I agree that the seizure of appellant and the admission into evidence of the fruits of that unlawful arrest constitute a manifest violation of appellant's Fourth Amendment rights. Indeed, the Commonwealth concedes that appellant was seized without probable cause.

Where, as here, the police restrain a person's freedom of action beyond the period of time required to effectuate a *Terry* stop and without probable cause to arrest, it is of no constitutional significance whether that restraint is accomplished by detaining the person where he is initially encountered or by transporting the person to another location. In both circumstances, there is an unlawful arrest, a violation of the Fourth Amendment. *Dunaway v. New York*, 442 U.S. 200, 206–16, 99 S.Ct. 2248, 2253–59 (1979).

FLAHERTY, J., joins in this concurring opinion.

McDERMOTT, Justice, dissenting.

I dissent.

Stripped to its essentials, the majority holds or seems to hold that, had the police brought the complainant to the suspects and not the suspects to the complainant, the result would be different. *See* at 980. The distance travelled in either instance was at most a block and a half. That a block and a half might swallow the "*Terry* exception" is the type of finicky preciousness that has solidified our reputation for unreality.[1]

I would affirm the order of the Superior Court.[2]

COMMONWEALTH of Pennsylvania, Appellee,

v.

Diane Hamill METZGER, Appellant.

Supreme Court of Pennsylvania.

Argued April 23, 1982.
Decided Oct. 5, 1982.

Defendant was convicted before the Court of Common Pleas, Delaware County, Criminal Division, at Nos. 4490 A–K, December Sessions, 1978, Robert A. Wright, J.,

1. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

2. I note in passing that appellant will be unable to enjoy the largesse of the Court in awarding him a new trial because he died nearly two years prior to the argument in this case. That appellant's counsel never bothered to inform the Court of this fact, demonstrates either a cynical disregard for the client's participation in the appeal process or a shocking attempt to deceive this Court. In either event, counsel's failure to notify the Court of appellant's death brings to light a sinister and rapidly expanding side of the criminal justice system, in which lawyers parade about and argue and delay for their own benefit, while truth and fairness, and even the clients' interests, are forgotten.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA : JANUARY TERM, 1979

v. :

ANDRE LOVETTE, Appellant : NO. 497

PETITION TO ABATE APPEAL

TO THE HONORABLE, THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT:

EDWARD G. RENDELL, District Attorney of Philadelphia County, by ERIC B. HENSON, Deputy District Attorney, GAELE McLAUGHLIN BARTHOLD, Assistant Chief, Appeals Division, and MARK S. GUREVITZ, Assistant District Attorney, respectfully requests that this Court abate the above-captioned appeal due to the death of the defendant, and in support thereof represents as follows:

1. This is a discretionary direct appeal by defendant from the judgment of the Superior Court, Commonwealth v. Lovette, 271 Pa. Superior Ct. 250 (1979), affirming the sentence imposed in the Court of Common Pleas of Philadelphia County at Information No. 1673, December Session, 1976. It was argued before this Court on April 15, 1982 and is pending decision.

2. The Commonwealth recently became aware that this defendant died on June 6, 1980. See certified copy of Death Certificate and

EXHIBIT "B"

Death Verification form attached hereto as Exhibits A and B respectively.

3. The rule in the federal courts and a large number of state jurisdictions is that a criminal appeal should be dismissed when the defendant dies while direct review of his conviction is pending. See, e.g., Dove v. United States, 423 U.S. 325 (1976) (certiorari petition dismissed); Durham v. United States, 401 U.S. 481 (1971 (appeal abated); List v. Pennsylvania, 131 U.S. 396 (1888) (appeal abated); United States v. Janney, 525 F.2d 1208 (5th Cir. 1976) (abates ab initio); United States v. Toney, 527 F.2d 716 (6th Cir. 1975), cert. denied sub. nom., 429 U.S. 838 (1976) (ab initio); United States v. Moelenkamp, 557 F.2d 126 (7th Cir. 1977) (ab initio); United States v. Littlefield, 594 F.2d 682 (8th Cir. 1979) (ab initio); United States v. Bechtel, 547 F.2d 1379 (9th Cir. 1977) (ab initio). See Annot., 9 A.L.R. 3d 462, §11 at 496 (and supplement) (collecting both state cases dismissing appeal and cases abating proceeding ab initio); Annot., 83 A.L.R. 2d 864, §2 at 864 (and Later Case Service) (same).

4. Notwithstanding the foregoing, this Court has held that the death of a criminal defendant does not abate his appeal. Commonwealth v. Walker, 447 Pa. 146 (1972) (Justice Nix concurred in the result and Justice Pomeroy dissented). The Commonwealth urges this Court to adopt the reasoning of Justice Pomeroy's dissenting opinion; i.e., that the death of defendant renders his appeal moot. This is the view of the majority of those federal and state courts which have considered this issue.

5. The already unpersuasive rationale for the Walker doctrine has been undermined by Pennsylvania's recently enacted expungement statute. To the extent that a dead defendant's estate and society have an interest in "vindicating" his rights, see Commonwealth v. Walker, supra at 147-48 n.*, the new Criminal History Information Act protects this "interest." The defendant's entire criminal history will, upon application, be expunged after the subject has been dead for three years. 18 Pa.C.S.A. §9122(b)(2). Thus, this defendant's estate will soon be entitled to relief on its only remaining interest in the case: removal of the criminal record, which includes not only this conviction but also a subsequent robbery conviction. See Court History, attached hereto as Exhibit C.

6. Conservation of judicial resources and the well-settled doctrine that this Court not render advisory opinions, e.g. Commonwealth v. Joint Bargaining Committee, Etc., 484 Pa. 175 (1979); In re Gross, 476 Pa. 203 (1978); Commonwealth v. Walker, supra at 152 (dissent of Justice Pomeroy citing cases); Commonwealth v. Gunther, Constitutional Law 1578 (9th ed. 1975) (a legal question can become moot if intervening facts deprive litigant of necessary stake in outcome), requires that this appeal be abated now that estates of deceased defendants have other more appropriate remedies.

WHEREFORE, the Commonwealth respectfully requests that this Court abate the above-captioned appeal, or, in the alternative, list this matter for full Court argument.

Respectfully submitted,

MARK S. GUREVITZ
Assistant District Attorney

GAELE McLAUGHLIN BARTHOLD
Assistant Chief, Appeals Division
ERIC B. HENSON
Deputy District Attorney

COMMONWEALTH OF PENNSYLVANIA :

: SS:

CITY AND COUNTY OF PHILADELPHIA :

MARK S. GUREVITZ being duly sworn according to law deposes and says that he is an Assistant District Attorney in and for the County of Philadelphia and that the facts set forth in the foregoing Petition are true and correct to the best of his knowlege, information and belief.

MARK S. GUREVITZ

Sworn to and subscribed :

before me this :

day of :

NOTARY PUBLIC

THE ORIGINAL CERTIFIED COPY OF THE CERTIFICATE OF DEATH DESIGNATED AS EXHIBIT "A" IS ATTACHED TO THE ORIGINAL COPY OF THE PETITION AND HAS NOT BEEN REPRODUCED DUE TO THE PROHIBITION AGAINST DUPLICATION CONTAINED ON THE FACE THEREOF.

EXHIBIT "A"

DEATH VERIFICATION INVESTIGATION

(Fill out in Quadruplicate)

DISTRICT ATTORNEY'S OFFICE

This form is to be used by the District Attorney's Detectives to facilitate the investigation and verification of the death of a victim, witness or defendant. It is not necessarily to be used or accepted in lieu of a Death Certificate.

DECEDENT INFORMATION

NAME	RACE	SEX	DOB	SOCIAL SECURITY #
[redacted]	[illegible]	[illegible]	[illegible]	[illegible]

AKA	ADDRESS (Last Known)
	[illegible] S. [illegible] St.
	Phila. Pa. [illegible]

CASE INFORMATION

TERM & BILL NO	PHOTO NO	
	STATE	☐ VICTIM ☐ WITNESS ☒ DEFENDANT

VERIFICATION INFORMATION

DATE OF DEATH	LOCATION
6-6-80	Misericordia Hosp. 54 & Cedar

PHILA. C.M.E. NO. OTHER CORONER NO.	PHILA. POLICE ID NO. (If different than Photo No.)	P.B. NO.
2788-80		

DEATH CERTIFICATE CHECK	NO	VERIFIED BY FINGERPRINTS
☒ YES ☐ NO	[illegible]	☐ YES ☐ NO

ADDITIONAL INFORMATION

Mother-Simone Lovette Father-Connell Lovette

Funeral Director-Hawkins, 5708 Haverford Ave.

Burial-White Chapel Cemetary, Feasterville Pa.

Cause of death-Gunshot Wounds (5) of Thorax, Right Arms and Legs.

Doctor-[redacted] Dr. Catherman CHa. [illegible] Univ. Hosp.

DATE REQUESTED	REQUESTOR	UNIT
[illegible]-82		

DATE VERIFIED	VERIFYING DETECTIVE (Signature)	NO
7-09-82	Det. Albert Hall	[illegible]

D.A. DETECTIVE SUPERVISOR (Signature)	TITLE	NO
Lt. R. King	Lt.	[illegible]

1-331 DISTRIBUTION 1. D.A. CASE FILE 2. R.O.R. AGENCY 3. CLERK QUARTER SESSIONS 4. D.A.D. RECORDS

EXHIBIT "B"

TRL DT 0/00/00 COMMON PLEAS AND MUNICIPAL DATE 07/20/7
ROOM COURTS OF PHILADELPHIA PAGE 1
COURT HISTORY

NAME- LOVETTE ANDRE POLICE
1120 S 54TH ST. 5209
PHILA. PA 19100 SEX RA
M N
BIRTH DAT
10/08/57

ACT DT	COMPLAINT # REC. CNTRL. #	JUDGE	ATTORNEY
A071876	76-12-44063 MC7607-1581	1/1 LEHRER, S M	
S083076	THEFT UNL TAK/DISP	PRE-IND. PROB./ARD	
	THEFT REC STOLEN PROPERT	PRE-IND. PROB./ARD	
	UNAUTH USE AUTO OTHER VE	PRE-IND. PROB./ARD	
A071876	76-12-44063 MC7607-1581	1/1 DOTY, E A	
S100476	THEFT UNL TAK/DISP	PROS W/D W/O PREJUDICE	
	THEFT REC STOLEN PROPERT	PROS W/D W/O PREJUDICE	
	UNAUTH USE AUTO OTHER VE	PROS W/D W/O PREJUDICE	
A071876	76-12-44063 MC7607-1582	1/1 HARRIS, K S	
S071876	KNOW/POSS CONTROLLED SUB	DISMISSED PREL ARRAIGNMT	
A102476	76-12-65995 MC7610-2642	1/1 COMMONWEALTH / D	DEF. ASSOC.
S110976	RES ARST LAW ENFORCEMENT	PRE-IND. PROB./ARD	
	DISORDERLY CONDUCT PERSI	PRE-IND. PROB./ARD	
A121676	76-12-76170 MC7612-1261	1/1 POSERINA, J J	DEF. ASSOC.
S122276	CRIMINAL CONSPIRACY	DISCHARGED/DISMISSED	
	THEFT UNL TAK/DISP		
A121676	76-12-76170 CP7612-1673	1/1 SNYDER, B	DEF. ASSOC.
S021177	BURGLARY	WAIVER GUIL SENT. IMP.	MIN LESS 1 YR-MAX 2 YRS
	THEFT UNL TAK/DISP	WAIVER GUIL SENT. IMP.	MIN LESS 1 YR-MAX 2 YRS
	THEFT REC STOLEN PROPERT	WAIVER GUIL SENT. IMP.	MIN LESS 1 YR-MAX 2 YRS

INFORMATION INDICTMENT

EXHIBIT "C"

CONTINUED- LOVETTE ANDRE

A111676 76-10-74910 CP7611-1784 1/1 SILVERSTEIN, P DEF. ASSOC.
S051477 ROBBERY GUILTY PLEA NEGOTIATED PROBATION-3 YEARS

INFORMATION INDICTMENT

A092477 77-12-15938 MC7703-2342 1/1 SIMMONS,JR., J DEF. ASSOC.
S062377 KNOW/POSS CONTROLLED SUB PROB W/D VERD-SEC 17

A070677 77-12-40446 CP7707-1279 2/2 SILVERSTEIN, P MAXYHUIK, D
S090177 ROBBERY NOLLE PROS
CRIMINAL CONSPIRACY NOLLE PROS

INFORMATION INDICTMENT

A072979 79-09-40741 MC7907-2715 1/1 GORDON, L
S072979 GAMBLING DEVICES/GAMBLIN DISMISSED PREL ARRAIGNMT

P R E S E N T E N C E A N D P S Y C H I A T R I C R E P O R T I N F O .

MICRO FILM#	REC. CNTRL#	JUDGE	PRE-SENTENCE COMPLETION DT	PSYCHIATRIC COMPLETION
00000	CP7612-1573 1/1	SNYDER, B	2/28/77	

82-918

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 918

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

ANDRE LOVETTE, AND SIMONA LOVETTE,
Representative of the Estate of
Andre Lovette, Respondents

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

ERIC B. HENSON
Deputy District Attorney
Law Division
(Counsel of Record)
MARK S. GUREVITZ
Assistant District Attorney
GAELE McLAUGHLIN BARTHOLD
Assistant Chief
Appeals Division
EDWARD G. RENDELL
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ADDITIONAL QUESTION PRESENTED

Whether a writ of certiorari should issue to determine whether the federal mootness doctrine defeats this Court's jurisdiction and prevents further appellate review, in derogation of public and state interests, where in the state court the respondent, a deceased criminal defendant, and his substituted personal representative, successfully opposed a Petition to Abate his appeal and obtained a favorable result?

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TABLE OF CITATIONS

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982
NO. 918

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

ANDRE LOVETTE, AND SIMONA LOVETTE,
Representative of the Estate of
Andre Lovette, Respondents

PETITIONER'S REPLY BRIEF ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, seeks a Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of Pennsylvania entered in this case on October 5, 1982.

SUPPLEMENTAL STATEMENT OF THE CASE

In this reply brief, petitioner, the Commonwealth of Pennsylvania, pursuant to U.S. Sup. Ct. Rule 22.5, addresses only respondents' challenges to the jurisdiction of this Court.

ADDITIONAL REASONS FOR GRANTING THE WRIT

RESPONDENTS' ASSERTIONS THAT THIS CASE IS MOOT AND THAT THE DECISION OF THE COURT BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND DO NOT VITIATE THIS COURT'S JURISDICTION.

Respondents contend that this Court is without jurisdiction to consider the significant legal issues here presented. Their fervent attempt to avoid this Court's review inadvertently establishes the appropriateness of such review: they raise a substantial additional question which is worthy of this Court's consideration.

The doctrine of mootness, upon which respondents primarily rely to vitiate this Court's jurisdiction, is expressive of the need for antagonistic litigants who will advance vigorous arguments to protect substantive rights and thus focus the issues

presented. Jacobs v. New York, 388 U.S. 431, 87 S. Ct. 2098, Dissenting Opinion of Mr. Justice Douglas (1967). This objective is met here.

Respondents' counsel, the Defender Association of Philadelphia, vigorously sought, in the Pennsylvania Supreme Court, to "vindicate" their client, Andre Lovette, and to reverse his well-warranted burglary conviction despite Lovette's premature demise.[1] When petitioner, the Commonwealth of Pennsylvania, learned of Lovette's death, after full briefing and argument in the Pennsylvania Supreme Court, it promptly filed a Petition to Abate the Appeal. Respondents' counsel, contrary to its present stance, urged that this case be decided on its merits.

---

[1] Respondent Andre Lovette died on June 6, 1980, the victim of five (5) gunshot wounds. His defense-requested, discretionary Pennsylvania Supreme Court appeal was orally argued on April 15, 1982.

The Defender Association contended that the legal questions presented "are of vital importance not only to other defendants accused of crimes, but to the general public," and also relied on Simona Lovette's application to be substituted for her deceased son as a party on appeal (Answer to Petition to Abate Appeal, infra at 2A-3A, 4A, 7A-8A; Pa.R.A.P. 502).

Under these circumstances, an actual case or controversy exists, and invocation of the mootness doctrine is, therefore, manifestly inappropriate. Certainly, full briefing and argument on the putative mootness question are warranted. Here uniquely this Court has an opportunity to decide whether a criminal defendant, who obtains post-mortem "vindication" in a state court, can then disingenuously invoke the mootness doctrine to avoid review by this Court. Compare Dove v. United States, 423 U.S. 325, 96 S. Ct. 579 (1976) (death of

petitioner-defendant during pendency of petition for certiorari resulted in dismissal of petition); Pennsylvania v. Linde, 409 U.S. 1031, 93 S. Ct. 523 (1972) (same where defendant-respondent dies during pendency of petition).

Respondents' alternative attempt to avoid this Court's review, on the ground that the decision below rested upon an adequate and independent state ground, is similarly meritless (see, e.g., Pending Petition at 12). Despite their artifice, they effectively contend only that the decision in question might have been based on non-federal grounds. This Court's jurisdiction, however, is unimpaired "even if the State Constitution would have provided an adequate basis for the judgment," where, as here, the state Supreme Court "did not intend to rest its decision independently on the State Constitution." Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 1395 (1979).

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in its prior petition, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

ERIC B. HENSON
Deputy District Attorney
Law Division
(Counsel of Record)
MARK S. GUREVITZ
Assistant District Attorney
GAELE McLAUGHLIN BARTHOLD
Assistant Chief
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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1982
NO. 918

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

ANDRE LOVETTE, AND SIMONA LOVETTE,
Representative of the Estate of
Andre Lovette, Respondents

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, ESQUIRE, Counsel for Petitioner, Commonwealth of Pennsylvania, hereby certify that I have served three (3) copies of Petitioner's Reply Brief on Petition for Writ of Certiorari to the Supreme Court of Pennsylvania by hand delivery upon Counsel for Respondents, John W. Packel, Esquire, Defender Association of Philadelphia, 121 North Broad Street, Philadelphia, Pennsylvania 19107, on January 20, 1983.

Eric B. Henson

ERIC B. HENSON
Deputy District Attorney
Law Division
1300 Chestnut Street
Philadelphia, Pa. 19107

Sworn to and subscribed :
before me this 20th day :
of January, 1983, A.D. :

Joyce M. Nicholas

NOTARY PUBLIC

My Commission Expires: 9/19/83

JOYCE M. NICHOLAS
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 19, 1983

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA : JANUARY TERM, 1979

v. :

ANDRE LOVETTE, : NO. 497
Appellant

ANSWER TO PETITION TO ABATE APPEAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Andre Lovette, by his attorneys, Leonard Sosnov, Assistant Defender, Elaine DeMasse, Assistant Defender, Deputy Chief, Appeals Division, John W. Packel, Assistant Defender, Chief, Appeals Division, and Benjamin Lerner, Defender, respectfully answers the petition to abate filed in the captioned matter and represents:

1. This answer is in response to, and opposing the Commonwealth's petition to abate the appeal in this case because of the death of the defendant, a fact of which the Commonwealth and defense counsel recently became aware. The Commonwealth's petition was served on defense counsel on July 27, 1982.

2. The Commonwealth's petition to abate this appeal because of the death of the defendant should be denied since this Court, in an opinion by Justice Roberts, held in Com-

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monwealth v. Walker, 447 Pa. 146, 288 A.2d 741 (1972), that the death of a defendant in a criminal case while the case is on appeal does not abate the appeal, as the Commonwealth's motions to abate the appeal and dismiss the appeal in Walker were denied, and this Court proceeded to decide the pending appeal in that case on the merits.* The holding in Walker, was subsequently explained by Justice Nix in Stauch Estate, 451 Pa. 288, 293-94, 301 A.2d 615, 618 (1973).

> In Walker, we rejected a claim that the defendant's death should interrupt the direct appeal procedure. We did so because the completion of the criminal adjudicatory process is of concern to society as a whole. Punishment of the defendant is only one aspect of that concern and there are other aspects which transcend the death of the defendant. An appellate review as to the propriety of the conviction below is necessitated because there are consequences which flow from conviction which extend beyond the death of the defendant.

3. In this particular case, there are important consequences which flow well beyond Andre Lovette or his family. The search and seizure questions involved in the Lovette

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* Among other reasons given for this Court's decision in Walker, was the interest of the estate of the deceased in a decision on the merits. The Commonwealth contends that this interest is now completely protected by 18 Pa.C.S.A. §9122 (b)(2). However, the Commonwealth misinterprets this provision, as it does not provide for automatic expungement after the deceased has been dead for three years, as application may then be made, and expungement "may" then be granted, as a court has discretionary power to deny such an application. This provision should be compared with 18 Pa.C.S.A. §9122(a), which provides under other circumstances that the record "shall be expunged".

2A

case are of vital importance not only to other defendants accused of crimes, but to the general public. In this case, an intermediate appellate court has issued an opinion which is binding precedent on the lower courts of this Commonwealth, and which contains a new doctrine which has become known as the Lovette "intermediate response rule". See Commonwealth v. Lumb, Pa. Super., 430 A.2d 1188, 1189 (1981). It is a constitutional question of great public importance whether police may not only stop citizens, but place them in police cars and transport them to another location when there is concededly no probable cause to arrest. The Superior Court ruled that such police conduct is consistent with the constitution, the first time an appellate court in this Commonwealth made such a ruling. Counsel for appellant contended in his petition for allowence of appeal that the Superior Court's decision was contrary to applicable and controlling precedent of both this Court and the United States Supreme Court, and if permitted to stand would legally sanction dragnet and wholesale intrusions into the rights of our citizens. This Court recognized that there were special and important reasons for reviewing this determination and others in this case when it then granted the petition for allowance of appeal. See Rule 1114, Pa.R.App.P. Postponement of the decision of the important issues presented by this case is in nobody's interest since this case is ripe

for decision, having been fully briefed and argued before this Court. See Bursey v. United States, 466 F.2d 1059, 1089 (9th 1972). Thus, a separate and independent ground for not granting the Commonwealth's petition to abate this appeal is the well recognized exception to the mootness doctrines for questions of great public importance. Janet D. v. Carros, 240 Pa. Super. 291, 311, 362 A.2d 1060, 1070 (1976). See In Re Gross, 476 Pa. 203, ___, 382 A.2d 116, 122-23 (1978); Meyer v. Strouse, 422 Pa. 136, 138, 221 A.2d 191 ___ (1966).

4. Another independent ground for rejecting the Commonwealth's petition to abate is Rule 502, Pa.R.App.P., which provides for the substitution of a party who becomes deceased on appeal. The personal representative of the deceased may be substituted on appeal, upon application. See City of Newark v. Pulverman, 12 N.J. 105, ___, 95 A.2d 889, 894 (1953). Attached is the application for substitution as a party by Simona Lovette, defendant's mother and personal representative.

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For each and every of the foregoing reasons, the Commonwealth's petition to abate appeal should be denied, and this Court should proceed to decide this case on the merits.

Respectfully submitted,

Elaine DeMasse

LEONARD N. SOSNOV, Assistant Defender
ELAINE DeMASSE, Assistant Defender
Deputy Chief, Appeals Division
JOHN W. PACKEL, Assistant Defender
Chief, Appeals Division
BENJAMIN LERNER, Defender

COMMONWEALTH OF PENNSYLVANIA :

:

COUNTY OF PHILADELPHIA :

AFFIDAVIT

ELAINE DeMASSE , being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true and correct to the best of his/her knowledge, or information and belief.

Elaine DeMasse

ELAINE DeMASSE

Sworn to and subscribed before me this 4th day of August , 1982.

Joann D. Weikel

NOTARY PUBLIC

JOANN D. WEIKEL
Notary Public, Phila., Phila. Co.
My Commission Expires Oct. 8, 1982

6A

DEFENDER ASSOCIATION OF PHILADELPHIA
BY: Benjamin Lerner, Defender, and
LEONARD SOSNOV, Assistant Defender
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121 North Broad Street
Philadelphia, Pa. 19107
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Attorney for ANDRE LOVETTE

COMMONWEALTH OF PENNSYLVANIA	IN THE SUPREME COURT OF PENNSYLVANIA - EASTER DISTRICT
VS.	JANUARY TERM, 1979
ANDRE LOVETTE, Appellant	NO. 497

APPLICATION FOR SUBSTITUTION AS A PARTY

Simona Lovette, and counsel for her deceased son, John W. Packel, Assistant Defender, Chief, Appeals Division, Leonard Sosnov, Assistant Defender, Defender Association of Philadelphia, represent as follows:

1. Petitioner, Simona Lovette, is the mother of Andre Lovette, the appellant in the above captioned appeal pending before the Pennsylvania Supreme Court.

2. Andre Lovette, was single, had never married, and died without a will on June 6, 1980. Petitioner is the personal representative of Andre Lovette.

3. Petitioner desires that the appeal of Andre Lovette from his judgment of conviction and sentence be decided by the Pennsylvania Supreme Court. Therefore, petitioner requests that she be substituted for her deceased son as a party before this Court for purpose of this appeal.

Respectfully submitted,

Simona Lovette

SIMONA LOVETTE

COMMONWEALTH OF PENNSYLVANIA :

:

COUNTY OF PHILADELPHIA :

AFFIDAVIT

SIMONA LOVETTE , being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true and correct to the best of his/her knowledge, or information and belief.

Simona Lovette

SIMONA LOVETTE

Sworn to and subscribed before me this 4th day of August, 1982.

Joann D. Weikel

NOTARY PUBLIC

JOANN D. WEIKEL
Notary Public, Phila., Phila. Co.
My Commission Expires Oct. 9, 1982

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